Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

Amoco Energy Trading Corporation,
Amoco Production Company,
Anadarko Petroleum Corporation, Conoco Inc.,
Independent Petroleum Association of America and
Marathon Oil Company,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 31, 1996

223 pp

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission can refuse to exercise its jurisdiction over interstate pipeline gathering rates and services pursuant to Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, simply by permitting the interstate pipeline to transfer those services to an affiliate.

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1(b) and 29.6 of the Rules of the Supreme Court of the United States, Petitioners state as follows:

Amoco Energy Trading Corporation

Amoco Energy Trading Corporation is a Delaware corporation with its principal place of business in Houston, Texas. The parent company of Amoco Energy Trading Company is Amoco Production Company which is a wholly owned subsidiary of Amoco Company. Amoco Company is a wholly owned subsidiary of Amoco Corporation. Amoco Energy has no nonwholly owned subsidiaries.

Amoco Production Company

Amoco Production Company is a Delaware corporation with its principal place of business in Houston, Texas. The parent company of Amoco Production Company is Amoco Company which is a wholly owned subsidiary of Amoco Corporation. Amoco Production Company has the following nonwholly owned subsidiaries: Azerbaijan International Operating Company, Nile Delta Oil Company, Ekma Oil Company, Gulf Of Suez Petroleum Company, North October Petroleum Company, Rudeis Oil Company, Torsina Oil Company, Termap S.A., Egypt Trans Gas Company, Natural Gas Vehicles Company, East Tanka Petroleum Company, K 10A Production B.V., Statfjord Transport A.S. & Company, K/S Statfjord Transport A.S. & Company, Energia Del Sur S.A., Sharjah LPG Company, Limited, Beacon Gas Limited and East Texas Salt Water Disposal Co.

Anadarko Petroleum Corporation

Anadarko Petroleum Corporation ("Anadarko") is a corporation organized under the laws of the State of Delaware, with its principal place of business in Houston, Texas. Anadarko does not have parent companies or nonwholly owned subsidiaries.

Conoco Inc.

Conoco Inc. ("Conoco") is a Delaware corporation with its executive offices located in Houston, Texas. The parent company of Conoco is DuPont Energy Company. Conoco has no nonwholly owned subsidiaries.

Marathon Oil Company

Marathon Oil Company ("Marathon") is a corporation organized under the laws of the State of Ohio, with its principal place of business in Houston, Texas. The parent company of Marathon is USX Corporation. Marathon has no nonwholly owned subsidiaries.

Independent Petroleum Association of America

The Independent Petroleum Association of America ("IPAA") is a national trade association, representing approximately 5,500 individuals and non-integrated oil and natural gas producing companies. IPAA has no parent company and no nonwholly owned subsidiaries.

In addition to the above petitioners, the following were parties to the proceeding below:

Federal Energy Regulatory Commission (Respondent)
ANR Pipeline Company (Intervenor)
Arkansas Royalty Membership (Petitioner)
Associated Gas Services, Inc. (Intervenor)
Commissioner of Public Lands for State of New Mexico (Intervenor)
El Paso Natural Gas Company (Intervenor)
Exxon Corporation (Intervenor)
GPM Gas Corporation (Petitioner)
Interstate Natural Gas Association of America (Intervenor)
Natural Gas Clearinghouse (Intervenor)
New Mexico Energy, Minerals and Natural Resources Department (Intervenor)
NJR Energy Corporation (Intervenor)
Noark Pipeline System, Limited Partnership (Intervenor)
NorAm Field Services Corporation (Petitioner)
NorAm Gas Transmission Company (Petitioner)
Oklahom Independent Petroleum Association (Petitioner)
PanEnergy Gas Services, Inc. (Intervenor)
Panhandle Eastern Pipe Line Company (Intervenor)
Texaco Inc. (Petitioner)
Texaco Natural Gas Inc. (Petitioner)
Trunkline Gas Company (Intervenor)
Vesta Energy Company (Intervenor)
Williams Field Services Company (Intervenor)
Yukon Pacific Company L.P. (Intervenor)

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING . . . . . ii-iv

TABLE OF AUTHORITIES . . . . . vii-xi

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 12

A. THIS CASE HAS WIDESPREAD IMPACT . . 12

B. THE COURT OF APPEALS ERRED IN PERMITTING *DE FACTO* DEREGULATION OF INTERSTATE PIPELINE GATHERING RATES 13

C. THE COURT OF APPEALS' DECISION CONFLICTS WITH *NORTHERN* 17

D. THE COURT OF APPEALS' DECISION MISAPPLIED THE *CHEVRON* DOCTRINE . . 17

E. THE COURT OF APPEALS ERRED IN GIVING UNDUE DEFERENCE TO THE FORMAL CORPORATE STATUS OF INTERSTATE PIPELINE GATHERING AFFILIATES 19

CONCLUSION 23

APPENDICIES

APPENDIX A 1

APPENDIX B 34

APPENDIX C 36

APPENDIX D 104

APPENDIX E 171

APPENDIX F 174

APPENDIX G 178

APPENDIX H 180

TABLE OF AUTHORITIES

CASES:

Altamont Gas Transmission Co. v. Federal Energy Regulatory Commission,
92 F.3d 1239 (D.C. Cir. 1996) 20

Arkla Gathering Services Co.,
67 F.E.R.C. (CCH) ¶ 61,257 (1994) 2

Arkla Gathering Services Co.,
68 F.E.R.C. (CCH) ¶ 61,096 (1994) 9

Arkla Gathering Services Co.,
69 F.E.R.C. (CCH) ¶ 61,280, *aff'd*,
70 F.E.R.C. (CCH) ¶ 61,079 (1995) 2, 9

Armour Packing Co. v. United States,
209 U.S. 56 (1908) 18

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) . . . . . *passim*

Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581 (1945) . . . . . *passim*

Conoco Inc. v. Federal Energy Regulatory Commission,
90 F.3d 536 (D.C. Cir. 1996) . . . . . *passim*

First National Oil, Inc. v. Federal Energy Regulatory Commission, No. 95-9531 (10th Cir. filed July 7, 1995)
. 13

Table of Authorities Continued

Federal Power Commission v. Texaco Inc.,
417 U.S. 380 (1974) 16

General Telephone Co. v. United States,
449 F.2d 846 (5th Cir. 1971) 22

Interstate Natural Gas Co. v. Federal Power Commission,
331 U.S. 682 (1947) 4, 5, 11

KansOk Partnership, 73 F.E.R.C. (CCH) ¶ 61,160 at
61,484-88, *order granting stay, in part*,
73 F.E.R.C. (CCH) ¶ 61,293 (1995), *clarified*,
75 F.E.R.C. (CCH) ¶ 61,264 (1996) 20

Lechmere, Inc. v. National Labor Relations Board,
502 U.S. 527 (1992) 17

Louisiana Gas System Inc. v. Panhandle Eastern Corp.,
73 F.E.R.C. (CCH) ¶ 61,161 (1995), *reh'g denied*,
75 F.E.R.C. (CCH) ¶ 61,027 (1996) 20

Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,
497 U.S. 116 (1990) . . . . . Passim

*Mansfield Journal Co. v. Federal Communications
Commission*, 180 F.2d 28 (D.C. Cir. 1950) 22

MCI Telecommunications Corp. v. AT&T,
512 U.S. 218 (1994) 14, 15

Table of Authorities Continued

Natural Gas Gathering Services of Interstate Pipelines and Interstate Pipeline Affiliates--Issues Relating to Rates, Terms and Conditions of Service,
65 F.E.R.C. (CCH) ¶ 61,136 (1994) 8

Neal v. United States, 116 S.Ct. 763 (1996) 17, 19

Northern Natural Gas Co. v. Federal Energy Regulatory Commission, 929 F.2d 1261 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991) . . . . . *passim*

Northern Natural Gas Co.,
43 F.E.R.C. (CCH) ¶ 61,473, *reh'g denied*,
44 F.E.R.C. (CCH) ¶ 61,384 (1988) 7

Northwest Pipeline Corp.,
59 F.E.R.C. (CCH) ¶ 61,115, *reh'g denied*,
60 F.E.R.C. (CCH) ¶ 61,213 (1992) 7, 8

Pacific Gas & Electric Co. v. Federal Energy Regulatory Commission, No. 96-60036 (5th Cir. filed February 1, 1996) 13

Phillips Petroleum Co. v. Wisconsin,
347 U.S. 672 (1954) 14

Table of Authorities Continued

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408 (October 18, 1985), FERC Statutes & Regulations [Regulations Preambles] ¶ 30,665 (1985), *order on reh'g*, Order No. 436-A, 50 Fed. Reg 52,217 (December 23, 1985) FERC Statutes & Regulations [Regulation Preambles] ¶ 30,675 (1985), *order on reh'g*, Order No. 436-C, 34 F.E.R.C. (CCH) ¶ 61,404 (1986), *order on reh'g*, Order No. 436-D, 34 F.E.R.C. (CCH) ¶ 61,405 (1986), *order on reh'g*, Order No. 436-E, 34 F.E.R.C. (CCH) ¶ 61,403 (1986), *vacated and remanded sub nom. Associated Gas Distributions v. Federal Energy Regulatory Commission,* 824 F.2d 981 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988). . . 5

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911) 20, 21, 22

Williams Gas Processing Co. v. Federal Energy Regulatory Commission, 17 F.3d 1320 (10th Cir. 1994) 8

Williams Natural Gas Co. and Williams Gas Processing-Mid-Continent Region Co., 74 F.E.R.C. (CCH) ¶ 61,103, *reh'g denied*, 75 F.E.R.C. (CCH) ¶ 61,274 (1996) . . 12

STATUTES:

15 U.S.C. § 717 (1994) 4, 8

15 U.S.C. § 717c (1994) . . . . . *passim*

15 U.S.C. § 717d (1994) . . . . . *passim*

15 U.S.C. § 717f (1994) 10

Table of Authorities Continued

15 U.S.C. § 717r (1994) 2, 10

15 U.S.C. §§ 3301, *et seq.* 14

28 U.S.C. § 1254(1) (1994) 2

Pub. L. No. 101-60, 103 Stat. 157 (codified in scattered sections of 15 U.S.C. (1989)) 14

No. _____

IN THE
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OCTOBER TERM, 1996

Amoco Energy Trading Corporation,
Amoco Production Company,
Anadarko Petroleum Corporation, Conoco Inc.,
Independent Petroleum Association of America and
Marathon Oil Company

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

Amoco Energy Trading Corporation, Amoco Production Company, Anadarko Petroleum Corporation, Conoco Inc., Independent Petroleum Association of America and Marathon Oil Company [hereinafter collectively referred to as "Producer Petitioners"] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A at 1-34) is reported at *Conoco Inc. v. Federal Energy Regulatory Commission*, 90 F.3d 536 (D.C. Cir. 1996). The opinions of the Federal Energy Regulatory Commission ("FERC" or "Commission") reviewed by the court of appeals are reported at *Arkla Gathering Services Co.*, 67 F.E.R.C. (CCH) ¶ 61,257 (1994) (App. C at 36-103) and *Arkla Gathering Services Co.*, 69 F.E.R.C. (CCH) ¶ 61,280 (1994) (App. D at 104-70).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 2, 1996 (App. A at 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994) and 15 U.S.C. § 717r(b) (1994).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c(a) (1994) (App. G at 176), provides in pertinent part that

> [a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the [Federal Energy Regulatory] Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is

> not just and reasonable is declared to be unlawful.

Section 5 of the Natural Gas Act, 15 U.S.C. § 717d(a) (1994) (App. H at 180), provides that FERC shall have jurisdiction to review, on its own motion or in response to a complaint, the reasonableness of any rate charged by any natural gas company "in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission."

STATEMENT OF THE CASE

A. Supreme Court Precedents Regarding Regulation of Natural Gas Gathering Pursuant to Sections 4 and 5 of the Natural Gas Act.

As the court of appeals stated in its opinion, App. A at 3,

> [g]athering is the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system.[1]

Shortly after passage of the Natural Gas Act, the Supreme Court was confronted with claims by interstate pipelines that the pipelines could charge whatever they pleased for the production and gathering components in their rates. The

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[1] *Conoco Inc. v. Federal Energy Regulatory Commission*, 90 F.3d 536, 539 n.2 (1996)(citing *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)).

pipelines claimed that Section 1(b) of the Natural Gas Act deprived the Federal Power Commission ("FPC") (FERC's predecessor) of jurisdiction over the "production and gathering" of natural gas.[2]

In *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945), the Supreme Court laid that argument to rest. The Court held that the FPC had jurisdiction to set the rate for the gathering component embedded in interstate pipeline sales rates.[3] *Colorado Interstate*, 324 U.S. at 600-04. (These rates are usually referred to as "bundled" rates that incorporate components for the commodity of gas, for gathering, for transportation and for storage). The Court rejected arguments that Section 1(b) of the Natural Gas Act precluded any such regulation. The Court subsequently reaffirmed its holding in *Interstate*

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[2]Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1994) (App. E. at 171-172), provides, in pertinent part, that the Act

> shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale of ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[3]*Colorado Interstate* itself involved FPC orders setting the rates of an interstate pipeline (Colorado Interstate) and an allegedly "nonjurisdictional" affiliate (Canadian) which the FPC had held to be operating together as a single entity.

Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947). In *Interstate*, the Court noted:

> Unreasonable charges exacted at [the production and gathering] stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.

Id. at 693 (footnote omitted).

In the 1980's, FERC induced interstate pipelines to open their transmission systems to those who would compete with the pipeline sales function. One component of that effort was the adoption of regulations in FERC's Order No. 436[4] that required interstate pipelines to "unbundle" or separately state and charge, the components of the pipeline's sales and transportation rates. Gathering charges were one such component.

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[4]Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408 (October 18, 1985), FERC Statutes & Regulations [Regulations Preambles] ¶ 30,665 (1985), *order on reh'g*, Order No. 436-A, 50 Fed. Reg 52,217 (December 23, 1985) FERC Statutes & Regulations [Regulation Preambles] ¶ 30,675 (1985), *order on reh'g*, Order No. 436-C, 34 F.E.R.C. (CCH) ¶ 61,404 (1986), *order on reh'g*, Order No. 436-D, 34 F.E.R.C. (CCH) ¶ 61,405 (1986), *order on reh'g*, Order No. 436-E, 34 F.E.R.C. (CCH) ¶ 61,403 (1986), *vacated and remanded sub nom. Associated Gas Distributions v. Federal Energy Regulatory Commission*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

In response to the FERC's efforts, an interstate pipeline, Northern Natural Gas Company, argued that the fact that gathering charges were separated from the pipeline's sales and transportation rates meant that the pipeline could charge whatever it pleased for natural gas gathering service and could discriminate as it pleased. FERC held that it had jurisdiction to set rates, terms and conditions of gathering service performed by interstate pipelines, and rejected the notion that separately stating a gathering charge somehow deprived FERC of jurisdiction under the Natural Gas Act.[5]

The United States Court of Appeals for the Eighth Circuit affirmed FERC's decision:

> Under the circumstances of this case, which are nearly identical to those of *Colorado Interstate*, § 1(b) does not forbid the Commission from more directly exercising the authority granted in §§ 4 and 5. It is insignificant that transportation rather than sale is the service involved or that the rate for gathering is to be stated separately rather than "bundled." Stating the gathering rate separately from the related jurisdictional transportation rate does not magically "unbundle" the actual gathering activity performed over the pipeline's own facilities in

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[5]*Northern Natural Gas Co.*, 43 F.E.R.C. (CCH) ¶ 61,473, at 62,160-62, *reh'g denied,* 44 F.E.R.C. (CCH) ¶ 61,384, at 62,250-52 (1988).

> connection with continuing interstate transportation.

Northern Natural Gas Co. v. Federal Energy Regulatory Commission, 929 F.2d 1261, 1273 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991).[6]

The Eighth Circuit expressly defined the term "the pipeline's own facilities" to encompass facilities owned or controlled by pipeline affiliates. *Id.* at 1263 n.2. Any other reading would let pipelines evade regulation simply by restructuring their operations, putting gathering in separate corporations.

In the wake of the *Northern* decision, interstate pipelines seeking to challenge FERC jurisdiction over gathering rates, terms and conditions of service began to transfer or "spin down" gathering facilities to wholly-owned subsidiaries and affiliated corporations. The FERC permitted one of these transfers to occur, finding that FERC might exercise jurisdiction over the gathering services performed by the pipeline affiliate if any complaints were filed. *Northwest Pipeline Corp.*, 59 F.E.R.C. (CCH) ¶ 61,115, at 61,435, *reh'g denied,* 60 F.E.R.C. (CCH) ¶ 61,213 (1992), *clarified*, 63 F.E.R.C. (CCH) ¶ 61,308 (1993). Cross-appeals of the FERC's orders were dismissed by the United States Court of Appeals for the Tenth Circuit due to an alleged lack of a case

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[6]For decades, in establishing a bundled rate, the FPC and FERC reviewed the separate costs of each of these elements: transmission, storage, production and gathering through the process of cost classification, functionalization and allocation. These individual costs were added together to arrive at a "bundled" rate.

or controversy and alleged lack of aggrievement. *Williams Gas Processing Co. v. Federal Energy Regulatory Commission,* 17 F.3d 1320, 1322-23 (10th Cir. 1994).

In late 1993, the FERC initiated a public conference designed to permit the various segments of the natural gas industry to comment on the future course of FERC's policy over pipeline and pipeline affiliate gathering. *Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates--Issues Relating to Rates, Terms and Conditions of Service,* 65 F.E.R.C. (CCH) ¶ 61,136 (1993). The FERC's Gathering Service Policy proceeding led to the issuance of the orders on review.

B. The NorAm Orders Before Federal Energy Regulatory Commission.

On October 21, 1993, Arkla Gathering Services Company (now NorAm Field Services Corporation, hereinafter "NorAm Field Services") filed a petition for declaratory order in FERC Docket No. CP94-36-000, requesting a determination that certain facilities (hereinafter "subject facilities") intended to be transferred ("spun-down") from Arkla Energy Resources Company (now NorAm Gas Transmission Company, hereinafter "NorAm"), would be gathering facilities and therefore exempt from FERC's licensing jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1994). NorAm Field Services also requested that its gathering rates and services be declared exempt from the Commission's jurisdiction under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (1994).

Requests for rehearing of the May 27 Order were timely filed by, *inter alia*, Indicated Parties.[7] In addition, the Independent Petroleum Association of America ("IPAA") filed a motion to intervene out-of-time in Commission Docket No. CP94-36-000 and requested rehearing of the May 27 Order. By order of July 20, 1994, the Commission granted the requests for rehearing for purposes of further consideration and granted IPAA's motion to intervene out-of-time. *Arkla Gathering Services Co.*, 68 F.E.R.C. (CCH) ¶ 61,096 (1994).

On December 2, 1994, the Commission issued its "Order on Rehearing and Proposed Default Contract, and Deferring Action to Abandonment Application" (hereinafter "December 2 Order") in Commission Docket No. CP94-36-000. *Arkla Gathering Services Co.*, 69 F.E.R.C. (CCH) ¶ 61,280 (1994). FERC held that prior to NorAm's ceasing to provide gathering services through any of the subject facilities, including both the certificated subject facilities and the non-certificated ones, NorAm must be in compliance with

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[7]The Indicated Parties making this filing were Indicated Shippers (Amoco Energy Trading Company, Amoco Production Company, Anadarko Petroleum Corporation, Conoco Inc., Marathon Oil Company, Mobil Natural Gas Inc., Texaco Inc., Texaco Natural Gas Company, and Vastar Resources Inc.) and the Producer-Marketer Transportation Group Gathering Coalition. These parties, with the addition of Vesta Energy Company, concurrently filed a proposed settlement which was rejected by FERC and instead treated as a supplement to the rehearing request. *Arkla Gathering Services Co.*, 69 F.E.R.C. (CCH) ¶ 61,280, at 62,079 & n.18 (App. D at 112), *aff'd*, 70 F.E.R.C. (CCH) ¶ 61,079 (1995) (citing *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F.2d 204, 224 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 913 (1960)).

the requirements for a proposed change in service mandated by Section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d). *Id.* at 62,082. The Commission reaffirmed that NorAm also must file under Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), for abandonment authorization for any facilities which were certificated. *Id.* at 62,093-95. The Commission modified its guidelines for a default contract and required NorAm Field Services to file a modified default contract in conformity therewith. *Id.* at 62,093-95. FERC rejected Producer Petitioners' argument that FERC possessed and must exercise jurisdiction over the gathering rates, terms and conditions of service charged by NorAm Field Services. *Id.* at 62,091. FERC held that it would exercise jurisdiction over NorAm Field Services only if that company were found to engage in anticompetitive behavior in conjunction with its pipeline affiliate. *Id.* at 62,087.

C. The Court of Appeals' Decision.

The basis for federal jurisdiction in the court of appeals was 15 U.S.C. § 717r(b).

Insofar as is here pertinent,[8] the court of appeals found that *Colorado Interstate* was not controlling due to changed industry circumstances. *Conoco Inc. v. Federal*

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[8]In addition to arguments raised by Producer Petitioners herein, the court of appeals also considered and rejected an argument that the facilities transferred by the pipeline to its affiliate were not "gathering" facilities within the meaning of the Natural Gas Act. That claim is not presented by Producer Petitioners herein.

Energy Regulatory Commission, 90 F.3d 536, 546 (D.C. Cir. 1996) (App. A at 17). The court of appeals held that

> [t]he decisions relied on by the Producers predate the massive reorganization of the industry occasioned by Order Nos. 436 and 636, and the Court has not yet addressed many of the jurisdictional issues governing this restructured system.

Id. at 545 (App. A at 16-17).

The court of appeals also held that *Colorado Interstate* and *Interstate Natural* were not controlling because both decisions dealt with gathering rates charged by interstate pipelines, rather than gatherers. *Id.* The court of appeals dismissed the *Northern* holding as dictum. *Id.* at 546 (App. A at 18).

The court of appeals found that the FERC's interpretation of its jurisdiction *(i.e.*, that FERC had full rate jurisdiction over pipeline gathering but had no jurisdiction over affiliated gathering unless the affiliate was engaged in anticompetitive behavior in concert with the pipeline) was entitled to *Chevron*[9] deference. *Id.* at 549 (App. A at 24). Accordingly, the court of appeals rejected the challenges to FERC's orders brought by Producer Petitioners. *Id.* at 550 (App. A at 25).

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[9]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984).

REASONS FOR GRANTING THE PETITION

A. This Case Has Widespread Impact.

At issue in this case is the scope of federal regulation over literally thousands of miles of gathering facilities throughout the United States. Data filed by an interstate pipeline trade association in connection with FERC's Gathering Service Policy represented that at least 28.7% of the natural gas gathered in the United States was gathered by interstate pipelines or their affiliates.[10] Pipeline and pipeline affiliate gathering provides thousands of producers who may not have any realistic alternatives with access to the national interstate pipeline grid. A single interstate pipeline affiliate gatherer, Williams Field Services Company, reported in connection with the same proceeding that it controlled approximately 5,300 miles of gathering facilities in 7 states, with a net book value of approximately $856 million as of September 30, 1993. The orders at issue in this proceeding countenance a widespread and sweeping withdrawal of jurisdiction over rates, terms and conditions of service regulated by the FERC pursuant to longstanding precedents of this Court.[11]

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[10]Interstate Natural Gas Association of America, Gathering: Practice and Policy Under Open-Access Transportation, Report No. 93-3, at 11 (October 1993) (filed in FERC Docket No. RM94-4-000).

[11]*See, e.g., Williams Natural Gas Co. and Williams Gas Processing-Mid-Continent Region Co.*, 74 F.E.R.C. (CCH) ¶ 61,103 (1996), *reh'g denied*, 75 F.E.R.C. (CCH) ¶ 61,274 (Williams Natural Gas Company was granted authorization to abandon 41 separate gathering systems which total approximately 801 miles of varying diameter pipeline to Williams Gas Processing-Mid-Continent Region

An appeal raising the same or similar issues as were presented to the court of appeals below is presently pending before the Fifth Circuit.[12] *See Pacific Gas & Electric Co. v. Federal Energy Regulatory Commission*, No. 96-60036 (5th Cir. filed February 1, 1996). In addition, other proceedings raising the same or similar issues are still pending before FERC.

B. The Court of Appeals Erred in Permitting De Facto Deregulation of Interstate Pipeline Gathering Rates.

It is the duty of FERC to ensure that the rates, terms, and conditions of all services provided by interstate pipelines in connection with the transportation of natural gas in interstate commerce, including gathering services, are just and reasonable and non-discriminatory pursuant to Sections 4 and 5 of the Natural Gas Act, regardless of whether some facilities and services have been spun-down to an affiliate.

Absent an Act of Congress, FERC cannot deregulate the gathering services provided by interstate natural gas pipelines, whether or not spun-down to affiliates, in connection with the transportation of natural gas in interstate

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Company. Williams Natural Gas Company estimated the net book value at approximately $7.3 million.)

[12]Several additional related cases are pending in the United States Court of Appeals for the District of Columbia Circuit. Another appeal raising similar but not identical issues is pending before the United States Court of Appeals for the Tenth Circuit. *First National Oil, Inc. v. FERC*, No. 95-9531 (10th Cir. filed July 7, 1995).

commerce. FERC cannot ignore the Natural Gas Act or "deregulate" service subject to the Natural Gas Act on its own. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131-34 (1990) ("*Maislin*"). Deregulation lies within the exclusive domain of Congress. Nonetheless, deregulation is effectively what FERC has done. The FERC's policy allows interstate pipelines to nullify the Natural Gas Act by the simple expedient of creating an "affiliate," and spinning down gathering facilities to that affiliate. It is for Congress to determine whether a change in industry circumstances warrants a change in a federal statute.[13]

This Court, in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), specifically rejected an attempt to charge rates not on file with the Federal Communications Commission ("FCC"). The FCC had adopted a program of "permissive detariffing" in which it would, with respect to non-dominant carriers, forbear from enforcing the rate filing requirements which § 203 of the Communications Act imposed on every communications common carrier. This Court specifically rejected the FCC's detariffing proposal because § 203(a) provides that "every"

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[13]In its 1954 *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954), decision, the Court affirmed the FPC's extension of federal regulation to producer wellhead sales for resale of natural gas. Two acts of Congress (the Natural Gas Policy Act, 15 U.S.C. § § 3301, *et seq.* and the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (codified in scattered sections of 15 U.S.C. (1989))) were required to remove wellhead pricing from FERC's jurisdiction. In the orders on review, FERC seeks to withdraw federal regulations of interstate pipeline gathering with no statutory mandate whatsoever.

carrier "shall" file its tariff. Even though § 203(b) provides the FCC with authority to "modify any requirement" of § 203, this Court held that elimination of the tariff filing requirement went beyond modification and, hence, beyond the FCC's authority. *Id.* at 2231.

The language of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, mandates that FERC regulate rates for or in connection with interstate transmission of natural gas, and includes the requirement that those rates and tariffs for such services be filed with FERC. Just as the Interstate Commerce Commission ("ICC") in *Maislin* and the FCC in *MCI* did not have the statutory authority to allow the regulated entity to avoid the requirement of filing rates, so too FERC lacks the statutory authority to allow interstate pipelines or their gathering affiliates to avoid the requirement of filing rates for gathering services in connection with transportation subject to the jurisdiction of FERC.

Since it has been established that FERC has both Section 4 and Section 5 jurisdiction over the gathering rates charged by interstate pipelines and their gathering affiliates, FERC must also require that the rates charged for gathering be just and reasonable according to the mandate contained in Section 4(a) of the Natural Gas Act:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or

> charges, shall be just and reasonable, and any such rate or change that is not just and reasonable is declared to be unlawful.

15 U.S.C. § 717c(a) (App. G. at 176).

The Supreme Court in *Federal Power Commission v. Texaco Inc.*, 417 U.S. 380 (1974) ("*Texaco*"), upheld a court of appeals rejection of the FPC's contention that the "just and reasonable" standard was not mandatory and that the FPC could choose not to regulate rates over which it had jurisdiction. The Court stated:

> Whatever the position of the Commission heretofore has been, it wisely does not challenge that aspect of the Court of Appeals judgment. Sections 4 and 5 of the [Natural Gas] Act require that all gas rates be just and reasonable.

Id. at 394.

Colorado Interstate and *Northern* established that the interstate pipeline gathering rates and services at issue in this case are subject to FERC jurisdiction under the Natural Gas Act. FERC cannot disclaim its obligation to regulate affirmatively when such services are provided by an interstate affiliate rather than by the pipeline itself. The court of appeals erred in permitting it to do so.

C. The Court of Appeals' Decision Conflicts with Northern.

In *Northern,* the United States Court of Appeals for the Eighth Circuit acted to eliminate an obvious opportunity for interstate pipelines to circumvent federal jurisdiction over their gathering rates by transferring gathering facilities and services to affiliated corporations. In so doing, the Eighth Circuit acted in a manner fully consistent with the Court's governing *Colorado Interstate* decision, which itself involved federal regulation of gathering rates charged by an allegedly nonjurisdictional pipeline affiliate. The Eighth Circuit correctly affirmed the FERC's jurisdiction extended to regulation of interstate pipeline gathering services performed in connection with jurisdictional transmission service. Producer Petitioners submit that the court of appeals erred in disregarding *Northern* and *Colorado Interstate.* No realistic possibility exists of resolving this conflict in the absence of review by the Court.

D. The Court of Appeals' Decision Misapplied the Chevron Doctrine.

In holding that the FERC's construction of the scope of its jurisdiction over pipeline affiliate gathering was entitled to *Chevron* deference, the court of appeals found that the opinions of the Court relied upon by Producer Petitioners were not controlling due to claimed changed industry circumstances. *Conoco*, 90 F.3d at 549. The court of appeals erred in this regard. Once the Court has declared the meaning of a statute, the agency's decision must be evaluated against that settled law. *Maislin,* 497 U.S. at 131; *Neal v. United States,* 116 S.Ct. 763, 769 (1996) ("*Neal*"); *Lechmere,*

Inc. v. National Labor Relations Board, 502 U.S. 527, 536-38 (1992). An administrative agency such as FERC cannot be entitled to *Chevron* deference when its decision is at odds with controlling Supreme Court precedent, in this case, *Colorado Interstate*.

In this respect, the implications of the court of appeals' decision, unless reviewed by the Court, have wide-ranging significance that extends to judicial review of all administrative agency actions.

The Court's recent opinions clarify that an agency is not entitled to discard the Court's interpretations of a statute's meaning based on the agency's perceptions of public policy or changed industry conditions. In *Maislin*, the ICC claimed that it was permitted to allow a regulated carrier to charge a rate below the rate on file with the agency. The ICC claimed that its construction of the statute was rational, consistent with the statute, and entitled to *Chevron* deference. 497 U.S. at 130.

The Court rejected the ICC's contention, noting that the ICC's interpretation of the statute had been rejected in the Court's 1908 decision in *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). The Court explained:

> Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.

Maislin, 497 U.S. at 131.

The Court further explained the rationale for this doctrine in *Neal*:

> Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.

Neal, 116 S.Ct. at 769.

The court of appeals' decision at issue permitted FERC to deviate from longstanding Supreme Court precedent never modified by Congress. In so doing, the court of appeals misapplied the *Chevron* doctrine.

E. The Court of Appeals Erred in Giving Undue Deference to the Formal Corporate Status of Interstate Pipeline Gathering Affiliates.

The FERC and the court of appeals attempt to defend FERC's abdication of jurisdiction based only on an empty formalism: the contention that the gathering affiliate of an interstate pipeline "taking control" of the pipelines' gathering facilities and services is not a "natural gas company." In this respect, the decisions of FERC and the court of appeals are inconsistent with FERC's own precedents and controlling federal case law.

In stark contrast to the orders on review, FERC recently has determined in cases that do not involve "gathering" that FERC's jurisdiction over the transportation of natural gas cannot be defeated through the use of affiliates. *KansOk Partnership,* 73 F.E.R.C. (CCH) ¶ 61,160 at 61,484-88, *order granting stay, in part,* 73 F.E.R.C. (CCH) ¶ 61,293 (1995), *clarified,* 75 F.E.R.C. (CCH) ¶ 61,264 (1996); *Louisiana Gas System Inc. v. Panhandle Eastern Corp.,* 73 F.E.R.C. (CCH) ¶ 61,161, at 61,500-03 (1995), *reh'g denied,* 75 F.E.R.C. (CCH) ¶ 61,027 (1996). Both of these cases involved construction of coordinated allegedly "intrastate" pipeline segments held by separate corporate subsidiaries which, when viewed as a whole, were found to be interstate pipeline systems.

The United States Court of Appeals for the District of Columbia Circuit, in a decision issued only three weeks after the decision under review, cited the *Conoco* case. Ironically, the *Conoco* case was cited for the proposition that the "Commission may treat jurisdictional pipeline and nonjurisdictional gatherer as a single entity when services are tied. . . " *Altamont Gas Transmission Co. v. Federal Energy Regulatory Commission,* 92 F.3d 1239, 1245 (D.C. Cir. 1996).

Federal case law also recognizes that FERC should not give blind deference to corporate formalities in the exercise of its statutory responsibilities. As noted above, *Colorado Interstate* itself involved the exercise of FPC jurisdiction over allegedly "separate" corporations. Moreover, as the Court held in *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498 (1911), in

interpreting the scope of jurisdiction over allegedly "nonjurisdictional" corporate affiliates under the Interstate Commerce Act:

> Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts. . . .
>
> And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, "a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing

> that it is not in fact owned by any railroad company. . . . The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

Id. at 521-22.

Lower federal courts have also held that, for regulatory purposes, the activities of allegedly non-jurisdictional affiliates may be imputed to their jurisdictional parent. *See General Telephone Co. v. United States,* 449 F.2d 846, 855 (5th Cir. 1971); *Mansfield Journal Co. v. Federal Communications Commission*, 180 F.2d 28, 36-37 (D.C. Cir. 1950).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Appendix A - *Conoco Inc. v. Federal Energy Regulatory Commission*, 90 F.3d 536 (D.C. Cir. 1996) . . . 1

Appendix B - Amendment to *Conoco Inc. v. Federal Energy Regulatory Commission*, 90 F.3d 536 (D.C. Cir. 1996) . . 34

Appendix C - *Arkla Gathering Services Company*, 67 F.E.R.C. (CCH) ¶ 61,257 (1994) 36

Appendix D - *Arkla Gathering Services Company*, 69 F.E.R.C. (CCH) ¶ 61,280 (1994) 104

Appendix E - Section 1 of the Natural Gas Act 15 U.S.C.S. § 717 (1996) 171

Appendix F - Section 4 of the Natural Gas Act 15 U.S.C.S. § 717c (1996) . . . 174

Appendix G - Section 5 of the Natural Gas Act 15 U.S.C.S. § 717d (1996) . . . 178

Appendix H - Section 7 of the Natural Gas Act 15 U.S.C.S. § 717f (1996) . . . 180

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 16, 1996 Decided August 2, 1996

No. 94-1724

CONOCO INC.,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

VESTA ENERGY COMPANY, ET AL.,
INTERVENORS

Consolidated with
94-1726, 94-1729, 94-1730, 94-1731, 94-1732,
94-1735, 95-1007, 95-1013, 95-1080,
95-1172, 95-1342 & 95-1364

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Gordon Gooch argued the cause for petitioners and intervenors in support of petitioners Conoco Inc., et al. *Maria M. Seidler* argued the cause for petitioner Arkansas Royalty Membership. With them on the briefs were *Dena E. Wiggins, Emery J. Biro, III, Bruce A. Connell, Mickey J. Lawrence, David M. Sweet, Steven R. Hunsicker, Randall S. Rich* and *Christopher J. Bernard. Mario M. Garza, Susan B. Dyer, Elisa J. Grammar, Monique L. Penn-Jenkins* and *Cheryl J. Walker* entered appearances.

Richard D. Avil, Jr. argued the cause for petitioners and intervenors NorAm Gas Transmission Company, et al., with whom *James E. Gauch, Charles L. Pain, Craig R. Rich* and *Mari M. Dugger* were on the briefs.

Patricia L. Weiss, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent, with whom *Jerome M. Feit*, Solicitor was on the brief. *Timm L. Abendroth*, Attorney, entered an appearance.

John H. Cheatham, III, Richard C. Green, Kenneth M. Minesinger, Charles L. Pain, Craig R. Rich, Mari M. Dugger, Richard D. Avil, Jr. and *James E. Gauch*, filed the brief on behalf of inventors Interstate Natural Gas Association of America, et al. *Jean E. Sonneman* entered an appearance.

Daniel F. Collins entered an appearance for intervenor ANR Pipeline Company. *Peter G. Esposito* entered an appearance for intervenor Natural Gas Clearinghouse. *Lawrence G. Acker* and *Brian D. O'Neill* entered an appearance for intervenors Trunkline Gas Company and Panhandle Eastern Pipe Line Company. *Judy A. Johnson* entered an appearance for intervenor El Paso Natural Gas Company. *David S. Berman* entered an appearance for intervenor NJR Energy Corporation. *Steven A. Weiler* entered an appearance for intervenor for respondent NOARK Pipeline System. *Gordon J. Smith* entered an appearance for intervenor Pan-Energy Gas Services, Inc.

Patricia A. Curran entered an appearance for *amicus curiae* Cabot Oil & Gas Corporation.

Before: BUCKLEY, SENTELLE and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge:* In these consolidated petitions for review of five orders of the Federal Energy Regulatory Commission,[1] the principal issue is whether a jurisdictional exemption was properly granted to an affiliate of an interstate pipeline for its gathering[2] service, which had formerly been operated by the pipeline itself, so long as the affiliate's gathering service functioned independently of the pipeline's transportation service, and so long as the affiliate provided the pipeline's existing customers contract protection during a two-year transition period. Producer petitioners ("the Producers")[3] challenge the Commission's determination that the facilities to be transferred were exempt gathering facilities under § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b)

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[1] *Arkla Gathering Services Co.*, 67 F.E.R.C. ¶ 61,257 (1994) ("*Arkla I*"), *order on reh'g, Arkla Gathering Services Co.*, 69 F.E.R.C. ¶ 61,280 (1994) ("*Arkla II*"); *reh'g denied, Arkla Gathering Services Co.*, 70 F.E.R.C. ¶ 61,079 (1995) ("*Arkla IV*"); *reconsideration denied, Arkla Gathering Services Co.*, 71 F.E.R.C. ¶ 61,297 (1995) ("*Arkla V*"). *Arkla Gathering Services Co.*, 70 F.E.R.C. ¶ 61,018 (1995) ("*Arkla III*"), *order on reh'g, Arkla IV, order on reh'g, Arkla V.*

[2] Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system. *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990).

[3] Producer petitioners are Amoco Energy Trading Corporation, Amoco Production Company, Anadarko Petroleum Corporation, Arkansas Royalty Membership, Conoco Inc., Independent Petroleum Association of America, Marathon Oil Company, Oklahoma Independent Petroleum Association, Texaco Inc. and Texaco Natural Gas Inc.; producer intervenors are Exxon Corporation, Commissioner of Public Lands for the State of New Mexico, New Mexico Energy, Minerals and Natural Resources Department and Vesta Energy Company.

(1994).[4] The pipeline and gathering petitioners ("the Pipelines")[5] challenge the Commission's authority to require default contracts as a condition of the transfer. We conclude that there is substantial evidence to support the Commission's application of its primary function test[6] in determining that the gathering activity fell within the NGA § 1(b) exemption. We also conclude, however, that the Commission has not identified any source of authority to condition the transfer on Commission-prescribed default contracts with the pipeline's existing customers. Accordingly, we grant the Pipelines' petitions and deny the Producers' petitions, and we remand the cases to the Commission.

I.

These appeals arise in the wake of major regulatory changes in the natural gas industry. Beginning in 1978, when Congress enacted the Natural Gas Policy Act, 92 Stat. 3350, 15 U.S.C. §§ 3301 et seq., to deregulate some wellhead price controls, market forces began to play a greater role in determining the supply, demand and price of natural gas. *Transcontinental Gas Pipe Line Co. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986) ("*Transco*"). Following suit, the

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[4] Natural Gas Act ("NGA" or "the Act"), 15 U.S.C. §§ 717–717w (1994).

[5] The pipeline and gathering petitioners are NorAm Field Services Corporation ("NorAm Field"), NorAm Gas Transmission Company ("NorAm Gas") and GPM Gas Corporation; pipeline and gatherer intervenors are Interstate Natural Gas Association of America, a pipeline trade association, and Williams Field Services Co., a gathering affiliate. At the time of the Commission's initial order, NorAm Field was know as Arkla Gathering Services Company, and NorAm Gas was known as Arkla Energy Resources Company. For ease of reference we refer to NorAm Field and NorAm Gas in this opinion.

[6] *See Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268 at 61,987–88 (1990); *see also infra* n.14.

Commission, in 1985, promulgated Order No. 436,[7] which established a program of open-access, nondiscriminatory transportation by which gas distribution companies and industrial end-users could buy natural gas directly from gas merchants other than pipelines and ship that gas on interstate pipelines. *See Associated Gas Distributors v. FERC*, 824 F.2d 981, 996 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). Then, in 1992, the Commission again altered the regulatory scheme in Order No. 636,[8] by mandating the unbundling of gas sales and interstate transportation that Order No. 436 simply encouraged, in order to give pipeline customers unimpeded access to the competitive wellhead market and to permit all gas sellers to compete on an equal basis. *See* 18 C.F.R. §§ 284.8(a)(1) & 284.9(a)(1)(1995); *United Dist. Companies v. FERC*, ___ F.3d ___ (D.C. Cir. July 16, 1996).

After Order No. 436, the Commission began to develop its policy regarding affiliate gatherers. *See Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates—Issues Related to Rates and Terms*

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[7] Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, [Regs. Preambles 1982–85] F.E.R.C. Stats. & Regs. (CCH) ¶ 30,665, *order on reh'g*, Order No. 436–A, [Regs. Preambles 1982–85] F.E.R.C. Stats. & Regs. (CCH) ¶ 30,675 (1985), *order on reh'g*, Order No. 436–B, [Regs. Preambles 1986–90] F.E.R.C. Stats. & Regs. (CCH) ¶ 30,688, *order on reh'g*, Order No. 436–C, 34 F.E.R.C. ¶ 61,404, *order on reh'g*, Order No. 436–D, 34 F.E.R.C. ¶ 61,405, *order on reh'g*, Order No. 436–E, 34 F.E.R.C. ¶ 61,403 (1986), *aff'd in part and vacated and remanded in part sub nom. Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[8] Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, III F.E.R.C. Stats. & Regs. (CCH) ¶ 30,939, *order on reh'g*, Order No. 636–A, III F.E.R.C. Stats. & Regs. (CCH) ¶ 30,950, *order on reh'g*, Order No. 636–B, 61 F.E.R.C. ¶ 61,272 (1992), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993), *aff'd in part and vacated and remanded in part*,

and Conditions of Service, 65 F.E.R.C. ¶ 61,136 at 61,689 (1993) ("*Gathering Service Policy*"). Although gathering is exempted from Commission jurisdiction by NGA § 1(b), the Commission required interstate pipelines that directly performed gathering services to file statements of their gathering rates as part of Order No. 436 enforcement.[9] After Order No. 636, the Commission did not require pipelines to include in their tariffs a gathering rate schedule, specifying the terms and conditions of the gathering services to be provided, but required the pipelines to file their separately stated gathering rates. *Gathering Service Policy*, 65 F.E.R.C. ¶ 61,136 at 61,689. In addition, as part of their Order No. 636 tariffs, pipelines must file statements that their gathering services are non-discriminatory, not unduly preferential, and not inconsistent with the terms and conditions of the Part 284 certificates authorizing them to provide interstate transportation. *Id.*

The Commission also found that it had jurisdiction to regulate gathering services provided by pipeline affiliates in connection with the pipelines' interstate transportation in some circumstances. The Commission noted that it had taken the position that it had jurisdiction under NGA §§ 4 & 5, 15 U.S.C. §§ 717c, 717d (1994), to determine the justness and reasonableness of the rates, terms, and conditions under which gathering service is performed in connection with interstate transportation. It cited *Northern Natural Gas Co.*, 43 F.E.R.C. ¶ 61,473 (1988), *reh'g. denied*, 44 F.E.R.C. ¶ 61,384 (1988), and *Northwest Pipeline Co.*, 59 F.E.R.C. ¶ 61,115 (1992) ("*Northwest Pipeline I*"), *reh'g. denied*, 60 F.E.R.C. ¶ 61,213 (1992) ("*Northwest Pipeline II*"), *petitions for review dismissed, Williams Gas Processing Co. v. FERC*, 17 F.3d 1320 (10th Cir. 1994). In *Northwest Pipeline II*,

> [t]he Commission expressed the view that the traditional form of regulation was not needed to address the mere potential for affiliate abuse, and that it would only regu-

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United Dist. Companies v. FERC, ___ F.3d ___ (D.C. Cir. July 16, 1996).

[9] Order No. 436, at 42,493, 18 C.F.R. § 284.7(d) (1990), *cited in Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1264 & n.12 (8th Cir. 1991).

> late gathering rates of pipeline affiliates if shown by a complaint that more extensive Commission regulation is necessary to invalidate an unjust and unreasonable rate or to correct an unduly discriminatory practice in order to preserve its primary grant of authority over interstate transportation or sales.

Gathering Service Policy, 65 F.E.R.C. ¶ 61,136 at 61,690 (citing 60 F.E.R.C. ¶ 61,213 at 61,729). Thus, interstate pipeline affiliates are not required to file with the Commission their gathering rates, conditions of service, or any other statements. *Id.*

The Commission acknowledged that there were differing views as to how (and even whether) gathering should be unbundled from interstate pipeline transportation. The Commission noted, for example, that under bundled firm-to-the-wellhead [10] rate design, "it is difficult for producers connected to other pipelines to compete." *Id.* On the other hand, some argued, "such rates are a logical extension of the Commission's requirement for SFV rates" mandated by Order No. 636, because firm-to-the-wellhead rate design removes fixed costs from usage rates in the production area and thus removes distortions in the choice among production connected to different pipelines.[11] *Id.* By early 1994, in an attempt to address new issues including those arising from proposals of interstate pipelines to "spin down" their gathering services to corporate affiliates or "spin off" their gathering services to a non-related corporate entity, the Commission convened a

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[10] Shippers who pay a firm-to-the-wellhead rate receive the right to firm transportation from the wellhead to their market delivery points. *Gathering Service Policy*, 65 F.E.R.C. ¶ 61,136 at 61,690.

[11] In straight fixed/variable (SFV) rate design, fixed costs are allocated to the reservation or demand charge for firm transportation capacity, while variable costs are allocated to the usage or commodity charge for the actual transportation of gas. Order No. 636 adopted SFV rate design in place of modified fixed/variable (MFV) rate design, in which some fixed costs are allocated to the usage charge. *United Dist. Companies*, ___ F.3d. at ___ & nn.24–25.

public conference to explore, among other things, the extent to which it should exercise its NGA §§ 4 & 5 authority over the rates, terms, and conditions of gathering services. *Id.* Ultimately, the Commission decided to address many of the issues with regard to gathering service performed by a pipeline affiliate on a case-by-case basis. *Arkla II,* 69 F.E.R.C. at 62,078 n.5.

In late 1993, NorAm Gas Transmission Company ("NorAm Gas") sought to "spin down" to a separate affiliate, NorAm Field Services ("NorAm Field"), gathering facilities located at 105 sites in Arkansas, Louisiana, Oklahoma and Texas. NorAm Gas wanted its gathering facilities to operate on a level playing field with those of independent gatherers unregulated by the Commission. NorAm Field, the affiliate, petitioned the Commission for a declaratory order disclaiming jurisdiction over the affiliate's gathering facilities, services and rates. NorAm Field contended that its gathering services would be exempt pursuant to NGA § 1(b) and itself, as a non-natural gas company, exempt from the Act. In its petition, NorAm Field stated that NorAm Gas had classified all the facilities that would be transferred as gathering facilities, and that, upon acquisition of these facilities, NorAm Field would continue to provide the same gathering services, but "conduct its business organizationally separate from [NorAm Gas']." On this basis, NorAm Field maintained that after acquisition the facilities should be exempt from Commission jurisdiction under NGA § 1(b).

The Commission made a preliminary determination that the facilities to be transferred were gathering facilities within the NGA § 1(b) exemption. *Arkla I,* 67 F.E.R.C. ¶ 61,257 at 61,866. The Commission relied on NorAm Field's representation that it would operate the gathering systems in essentially the same manner as had NorAm Gas, and on the nature, size, and configuration of the facilities themselves. The Commission declined, however, to declare NorAm Field's facilities exempt without assurances against affiliate abuse and protection for NorAm Gas' existing gathering service customers. NorAm Gas was, therefore, required to include

non-discriminatory and equal-access provisions in its tariff.[12] In light of what the Commission found were reasonable expectations of NorAm Gas' existing gathering customers that their service would not be arbitrarily terminated in the event of a spin-down or spin-off, or offered only at unreasonable terms, conditions, and rates, NorAm Field was required to show that it negotiated private contracts with NorAm Gas' existing customers. If NorAm Field could not negotiate a contract with a customer, it must offer the customer a "default contract" containing terms not inconsistent with those currently offered by independent gatherers in the particular region.

The Commission pointed out that it had previously regulated rates for gathering services provided by interstate pipelines such as NorAm Gas as part of its review of the pipelines' bundled gathering and interstate transportation rates. *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,872. In the Commission's view, "The pipelines' historical obligation to [their] gathering customers and the Commission's later requirement for open-access transportation created an expectation that the relationship between the pipelines and producers connected to their gathering systems would be governed by regulation, not private contract." *Id.* The Commission expressed concern that "in instances like the one here, where a pipeline is proposing to transfer its gathering operations to a non-pipeline entity, the existing customers could find themselves unable to contract for service of the pipeline's successor in interest." *Id.* With these concerns in mind, the Commission concluded that a "transition mechanism" was needed to ensure that "existing customers will not have their gathering service arbitrarily terminated," *Arkla II*, 69 F.E.R.C. ¶ 61,280

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[12] Specifically, the Commission required NorAm Gas to file tariff provisions with assurances that it would (1) provide non-discriminatory access, and not give any preference to customers of NorAm Field over customers of nonaffiliated gatherers, in scheduling, transportation, storage or curtailment and (2) not condition or tie its agreement to provide transportation service to an agreement by the producer, customer, or shipper relating to any service provided by its gathering affiliate. The Pipelines do not challenge the non-discriminatory, open-access conditions.

at 62,091–92, or "only offered [at] undue unreasonable terms, conditions and rates." *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,872.

On rehearing, the Commission clarified that "when a pipeline seeks to transfer gathering facilities it must file under section 7 for abandonment authorization for any facilities that are certificated, and under section 4 to terminate service for both certificated and uncertificated facilities." *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,083. The Commission also determined that the contract requirements for NorAm Gas' existing customers could be fulfilled by either NorAm Gas or NorAm Field, and specified that the new contracts must provide NorAm Gas' existing gathering customers two years' continued service at the same rate currently charged the customer for similar service, and at terms and conditions consistent with existing contracts or service. *Id.* at 62,092–94.

Thereafter, the Commission preliminarily accepted NorAm Gas' abandonment request, finally determined that the facilities were exempt gathering facilities, and provided further direction on the default contract issues. *Arkla III*, 70 F.E.R.C. ¶ 61,018 at 61,074–75. The Commission denied rehearing of its decision in *Arkla II*, and subject to a further default contract provision, granted abandonment and the request for a declaratory order. *Arkla IV*, 70 F.E.R.C. ¶ 61,079 at 61,223. Finally, the Commission denied rehearing of its order in *Arkla IV*, except as to the default contract issue, ordered a final revision to the contact, and issued its declaratory order contingent on the directed revision being made. *Arkla V*, 71 F.E.R.C. ¶ 61,297 at 62,170.

II.

Under the NGA, the Commission has jurisdiction over the interstate transportation of natural gas, but not over the gathering of natural gas.[13] The line between jurisdictional

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[13] Section 1(b) of the NGA provides that the Act

> shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for

transportation and nonjurisdictional gathering is not always clear. To draw that line, the Commission employs the "primary function test," which examines various factors to determine whether a facility is primarily devoted to gathering or to interstate transportation. The Producers contend that the Commission erred in three ways in conditionally granting NorAm Field's request for a declaratory order and NorAm Gas's request for permission to abandon the services. First, they contend that the Commission misapplied the primary function test, and that the finding that the spun down facilities are devoted to gathering was not supported by substantial evidence. Second, they maintain that even if the facilities provide gathering service, § 1(b) exempts only the physical activity of gathering from Commission regulation, and the Commission misinterpreted the NGA in declining to exercise authority over gathering rates. Finally, the Producers argue that the Commission's orders are internally inconsistent; if, as the Commission found, it would have jurisdiction to regulate NorAm Field's gathering services in the event of anticompetitive collusion between NorAm Field and NorAm Gas, say the Producers, then NorAm Field's services must be jurisdictional and cannot fall within the § 1(b) exemption. We are not persuaded by any of these arguments.

The primary function test is a set of factors that tend to indicate whether a facility is devoted to the collection of gas from wells—gathering—or to the further ("downstream") long-distance movement of gas after it has been collected—interstate transportation.[14] The test requires the Commis-

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> resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to* any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or *gathering of natural gas.*

15 U.S.C. § 717(b) (1994) (emphasis added).

[14] The primary function test was articulated by the Commission in *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063 at 61,143 (1983), and later modified in *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268 at

sion to "assess and weigh all of the specific facts and circumstances present in a given system." *West Texas Gathering Co.*, 45 F.E.R.C. ¶ 61,386 at 62,221 (1988). Several criteria are relevant, particularly the physical, geographical, and operational aspects of the facilities, but no factor is determinative, nor do all factors apply in every situation. *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1408 (10th Cir. 1990); *Farmland Industries*, 23 F.E.R.C. ¶ 61,063 at 61,143; *see also Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,867.

The Producers fault the Commission's application of the primary function test in this instance. The Producers maintain that the Commission went astray because it "denied parties the opportunity to develop a full and specific record," "examined only superficially the various ... factors" of the primary function test, and failed to examine the function of individual facility segments "as part of an integrated whole."[15] The Commission, the Producers assert, further misapplied the primary function test with respect to three criteria: the compressors; the central point in the field test; and the web-like configuration of many of the facilities.

61,987–88 (1990). *Louisiana Intrastate Gas Corp. v. FERC*, 962 F.2d 37, 42–43 (D.C. Cir. 1992). The parties to these proceedings fault only the Commission's application of the test, and do not dispute that the primary function test is a reasonable construction of the Commission's authority under NGA § 1(b) and merits deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[15] The Producers' contention that the Commission erred in denying them an evidentiary hearing to develop a full record in support of their position that the facilities function as an integrated part of the transmission system is meritless. The Commission concluded that there were no disputed material issues of fact that could not be resolved on the written record, *Arkla II*, 70 F.E.R.C. ¶ 61,079 at 61,221, and the Producers have not shown the contrary. The court has repeatedly held that the Commission "is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions." *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) (citations omitted).

Specifically, the Producers contend that the Commission did not develop a record to examine whether the compressors functioned to further downstream transportation, failed to specify those areas to which it found the central point in the field test applicable or adduce record evidence showing that the test was satisfied, and ignored how the facilities in different areas operated interdependently to further interstate transportation.

The Producers' complaints notwithstanding, we find that the Commission's determination that the facilities are primarily devoted to gathering is supported by the record. The Commission examined six factors.[16] It found, first, that the pipelines were generally short in length and small in diameter, which is indicative of gathering usage. *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,867. All except 15 of the 3,138 pipeline segments to be transferred are less than 8 miles in length; ninety percent of the pipelines are less than 6 inches in diameter and, except for pipelines at one location, all are less than 10 inches in diameter. *Id.* Second, the Commission found that many of the subject areas satisfy the central point in the field test.[17] The few exceptions are small fields with limited well connections and small diameter pipelines, or

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[16] The six factors are: (1) the length and diameter of the relevant lines; (2) the extension of the facility beyond the central point in the field; (3) the lines' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the lines. The first five factors were relied on by the Commission in *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063, and *West Texas Gathering Co.*, 45 F.E.R.C. ¶ 61,386; the sixth factor was considered in *Amerada Hess Corporation et al.*, 52 F.E.R.C. ¶ 61,268.

[17] Gathering generally involves the collection of gas from separate wells at a single point, the "central point in the field." There, it is delivered into a single line for interstate transportation. The central point in the field test examines whether the facilities in question are upstream of this single point, in which case they are likely to be gathering facilities, or downstream, in which case they are likely to be transportation facilities.

pipelines forming backbone-type structures. Third, the Commission observed that the facilities' three types of geographic configuration, particularly the web-like configuration, are consistent with a gathering determination. Fourth and fifth, the Commission noted that the minimal compression used and the location of numerous wells along the facilities are also consistent with gas gathering. *Id.* at 61,867.[18] Last, the Commission found that the majority of subject areas operate at low pressure, which is similarly indicative of gathering. *Id.* at 61,868. From these findings, the Commission concluded that all 105 systems qualified as exempt gas-gathering systems under NGA § 1(b). *Id.* at 61,869.

The Commission may not "disregard those facts or issues that prove difficult or inconvenient" or "refuse to come to grips" with certain evidence in applying the primary function test. *See Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992). The record reflects that the Commission, in fact, "treat[ed] fully 'each of the pertinent factors,'" *see id.* (quoting *Public Serv. Comm'n of New York v. FPC*, 511 F.2d 338, 345 (D.C. Cir. 1975)), and made specific findings with respect to the location of compressors upstream of processing plants, the applicability of the central point test to some areas, and the system's web-like geographical configuration. 67 F.E.R.C. ¶ 61,257 at 61,867–69. Unlike *Louisiana Intrastate Gas*, 962 F.2d at 42–43, where the court remanded because the Commission's decision was not based on the primary function test and lacked reasoned consideration, the Commission here gave reasoned consideration to each of the pertinent factors of the primary function test, articulating conclusions based on factual findings. The Producers identify no critical evidence that would undermine the Commission's decision. In evaluating and balancing the several factors under the primary function test, the Commission brings to bear its

[18] The facilities at issue consist of approximately 2,775 miles of pipelines that are attached to approximately 3,900 active wells, 2,000 additional wells that flow gas through interconnections with third-party gatherers, and another 1,300 wells that are presently either inactive or split connected and producing into competitors' gathering systems. *Id.* at 61,864.

considerable expertise about the natural gas industry. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951); *Motor Vehicle Manufacturer's Ass'n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42–43 (1983); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989). Consequently, in view of the substantial evidence to support the Commission's findings, there is no basis for the court to substitute its judgment for that of the Commission.

The Producers next contend that the Commission incorrectly expanded the scope of the § 1(b) gathering exemption to deregulate the rates, terms, and conditions for gathering service, contrary to prior Supreme Court decisions that held § 1(b)'s exclusion applicable only to the physical activities of gathering. The Commission's interpretation of § 1(b) is entitled to *Chevron* deference. *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283–84 (D.C. Cir. 1994) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)). The Supreme Court decisions cited by the Producers have addressed the Commission's jurisdiction over gathering rates charged only by interstate pipelines, and thus do not control the question whether the Commission may regulate rates charged by independent or pipeline-affiliated entities. Further, the statute itself does not clearly resolve the question one way or the other, and the Commission's interpretation is a permissible resolution of the ambiguity.

The Producers rely on several Supreme Court decisions and a decision from the Eighth Circuit for the proposition that § 1(b)'s exemption should be restrictively construed to apply only to the physical activities of gathering.[19] The Supreme Court "has consistently held that 'production' and

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[19] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 600–02 (1945); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947); *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991). *But see FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 506–07 (1949) ("*Panhandle III*").

'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. Kansas Corp. Comm'n*, 372 U.S. 84, 90 (1963). However, in each case in which the Court has applied this narrow definition of "production" and "gathering" to uphold the Commission's jurisdiction, the regulated entity was engaged in jurisdictional activity. Thus, when a natural gas company provided bundled sales and interstate transportation from its own wells to consumers and distributors, the Commission could properly include the company's production and gathering costs in its rate base for the bundled service. *Colorado Interstate*, 324 U.S. at 603. That holding expressly depended upon the company's jurisdictional sales, however; the case does not stand for the proposition that the Commission can regulate the rates charged by any gatherer. Similarly, the Court held that the Commission could regulate an independent producer's gas sales, but did so because the producer was engaged in a jurisdictional activity, namely sales for resale, not because the Commission has general rate-making authority over producers. *Phillips Petroleum*, 347 U.S. at 682. The Court has also held that the Commission may regulate curtailment of gas deliveries by interstate pipelines, even to direct-sales customers apparently excluded by another of § 1(b)'s exemptions, because of the Commission's authority over the pipelines' jurisdictional transportation. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 642–47 (1972).

What the Court has not done is to recognize Commission jurisdiction over entities performing neither jurisdictional sales nor jurisdictional transportation. The Commission was confronted in the instant case with two questions that the Court has not answered: (1) Does the Commission have jurisdiction over the rates charged by a gatherer that does not transport gas interstate nor engage in jurisdictional sales? and (2) If not, does the Commission nonetheless have jurisdiction if the gatherer is affiliated with a jurisdictional pipeline? The decisions relied on by the Producers predate the massive reorganization of the industry occasioned by Orders Nos. 436 and 636, and the Court has not yet ad-

dressed many of the jurisdictional issues governing this restructured system.

The Supreme Court introduced the concept of the "physical" activity of gathering when pipelines bundled together jurisdictional and nonjurisdictional activities. Under these circumstances, the Court upheld the reach of federal ratemaking regulatory jurisdiction to include both activities, focusing on the fact that the activity was a part of interstate transportation or sale by a natural gas company.[20] In this context the Court defined "gathering" narrowly, as limited to activities preceding sales for resale. *Phillips Petroleum*, 347 U.S. at 678 (citing *Colorado Interstate*, 324 U.S. at 598). The Commission did not reject the physical/nonphysical distinction made by the Court in the context of bundled service, but simply declined to apply it in a different factual and regulatory situation not contemplated by the Court's prior rationale. The Supreme Court has to date recognized only the Commission's authority to consider gathering costs "for the purposes of determining the reasonableness of rates subject to its jurisdiction." *Colorado Interstate*, 324 U.S. at 603; *see also Panhandle III*, 337 U.S. at 506 ("[t]he use of such data for rate making is not a precedent for regulation of any part of production or marketing."). The Producers did not ask the Commission to regulate derivatively and merely "tak[e] into account the production properties and gathering facilities of natural gas companies when it fixes their [bundled] rates." *Colorado Interstate*, 324 U.S. at 604. Rather, they sought to have the Commission directly regulate unbundled gathering rates charged by a non-natural gas company. Consequently, we find no inconsistency between the Supreme Court precedents and the Commission's determination that the gathering services at issue fall within NGA § 1(b)'s exemption.

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[20] *See Colorado Interstate*, 324 U.S. at 602–03; *Public Util. Comm'n of Colorado v. FERC*, 660 F.2d 821, 826 (1981) ("[T]he Supreme Court on numerous occasions has held that FERC ... may take into consideration nonjurisdictional items when setting jurisdictional rates."), *cert. denied*, 456 U.S. 944 (1982).

The Producers' reliance on *Northern Natural*, 929 F.2d 1261, is no more availing.[21] In that case, the Eighth Circuit upheld the Commission's jurisdiction to enforce the Order No. 436 requirement that interstate pipelines separately identify their costs attributable to bundled gathering services. As that court recognized, such jurisdiction was indistinguishable from the rate-setting authority recognized in *Colorado Interstate*. *Id.* at 1269. The only difference was that after Order No. 436, the gathering service was no longer bundled with jurisdictional sales, the jurisdictional "hook" relied on in *Colorado Interstate*. Gathering was still bundled with interstate transportation, however, and because "[s]ection 1(b) grants jurisdiction over interstate transportation and over interstate sales in the same words," there was no reason to come to a different result. *Id.*

The Producers rely on dictum in *Northern Natural* in an attempt to extend its holding—and that of *Colorado Interstate*—to cover the instant case. The Eighth Circuit concluded that the Commission "[m]ay ... under the NGA's §§ 4 and 5, regulate rates charged for gathering on the pipeline's own gathering facilities in connection with jurisdictional interstate transportation, notwithstanding the explicit § 1(b) exclusion of gathering from the act." *Id.* A footnote earlier in the decision defined " 'gathering facilities owned by the pipeline' and all substantially similar expressions ... to include such facilities owned or operated directly or indirectly by a pipeline or its parent, *affiliate*, subsidiary or lessors." *Id.* at 1263 n.2 (emphasis added). The Producers thus take the position that the Commission's conclusion here, that it lacks jurisdiction over NorAm Field's gathering facilities, conflicts with *Northern Natural* and is in error. Because the Eighth Circuit did not have before it a situation like the one that confronts us in the instant case, it did not have to consider

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[21] The Producers, in support of their *Northern Natural* argument, refer to the Tenth Circuit's decision in *Colorado Interstate Gas Co. v. FERC*, 83 F.3d 1298 (10th Cir. 1996). Because the Tenth Circuit's decision involves the Commission's authority over gathering services performed by an interstate pipeline, not an affiliate, it is distinguishable for the same reasons as is *Northern Natural*.

the full ramifications of its footnote. It did not discuss the issue of the jurisdictional status of affiliate-run gathering service, and it thus provides little persuasive authority on that issue. The court noted that "[t]he question is not before us of whether gathering performed by producers or independent gatherers for transportation in interstate commerce by an interstate pipeline is sufficiently connected to interstate transportation to justify rate regulation under §§ 4 & 5." *Id.* at 1274. Hence, the language in *Northern Natural* cannot be construed to indicate that the Eighth Circuit intended its dictum in footnote two, referring to an "affiliate," to apply to an independently operated gathering affiliate. Instead, the support for the Producers' position to be found in *Northern Natural* lies in the fact that the rationale underlying the Eighth Circuit's decision—namely, the perceived danger that unregulated pipeline gathering rates might pose to effective regulation of transportation rates—is reflected in the Commission's orders under review.[22] In light of such concerns, the Commission determined that NorAm Gas' gathering affiliate would be exempt from NGA jurisdiction only so long as the affiliate maintains an independent, arms-length relationship with the interstate pipeline. But *Northern Natural* provides no direct support for the Producers' more expansive claim that the Commission can regulate the gathering activities of the independent affiliate.

Thus, the Commission had some leeway in construing the NGA's jurisdictional provisions in the first instance, as there was no controlling judicial precedent. *Cf. Louisiana Power*, 406 U.S. at 631–36 & n.12 (considering efficacy of state

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[22] The Eighth Circuit stated that:

> Permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for interstate transportation. Thus the pipeline could grant forbidden preferences in interstate transportation for its own gas, to the disadvantage of third-party shippers.

929 F.2d at 1270.

regulation in construing Commission's jurisdiction and noting differing regulatory interests of gas-producing and gas-consuming states); *Northern Natural Gas Co. v. Kansas Corp. Comm'n*, 372 U.S. at 90 (noting limitation of production and gathering exemption to physical acts). Having determined that the gathering facilities fell within § 1(b)'s gathering exemption, the Commission concluded that it has no jurisdiction over an affiliate gatherer so long as the affiliate operates independently of the interstate pipeline and performs only non-jurisdictional activities. *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,870; *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,086–87. The Commission found that "[a] pipeline affiliate that does not itself provide any jurisdictional sales or transportation services, is not a natural gas company under the NGA." *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,086. Indeed, a company is not a "natural gas company" within the meaning of NGA § 2(6), 15 U.S.C. § 717a(6) (1994),[23] and hence not subject to the provisions of NGA §§ 4, 5 and 7, 15 U.S.C. §§ 717c, 717d, and 717f, unless the company either transports gas in interstate commerce or makes sales in interstate commerce of such gas for resale. It was within the scope of *Chevron* deference for the Commission to conclude that the NGA "shall not apply" to rates charged by a company providing only gathering services. Section 1(b) contemplates that some measure of authority over gathering should be reserved to the states, and jurisdiction over companies whose sole business is gathering is a permissible place to start.

Finally, the Producers challenge the Commission's conclusion that an independently operated affiliate, solely providing gathering services, would be exempt from the Commission's NGA §§ 4 & 5 authority to review rates, even though the Commission also reserved the right to exercise such authority

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[23] Section 2(6) defines "natural gas company" to mean:

> a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

15 U.S.C. § 717a(6).

if the affiliate should engage in anticompetitive behavior.[24] The purposes of the NGA would be subverted, the Producers contend, if an interstate pipeline could avoid NGA jurisdiction over the rates, terms, and conditions of its gathering service simply by spinning down its gathering facilities to an affiliate. According to the Producers: "the Commission cannot have it both ways. Either it has jurisdiction over the gathering service spun down to the affiliate or it does not. By asserting the potential of future exercise of jurisdiction, the Commission is acknowledging that it has jurisdiction." [25]

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[24] Section 4(a) provides that:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

15 U.S.C. § 717c(a) (1994). Section 5(a) provides in relevant part that:

> Whenever the Commission, after a hearing ... shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission ... is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force and shall fix the same by order.

15 U.S.C. § 717d(a) (1994).

[25] The Producers further contend that the Commission's decision is inconsistent with its later holdings that jurisdiction cannot be defeated where affiliated companies operate as one interstate pipeline. *See KansOk Partnership v. Williams Natural Gas Co.*, 73 F.E.R.C. ¶ 61,160 (1995), *order granting stay in part*, 73 F.E.R.C. ¶ 61,293 (1995); *Louisiana Gas System Inc. v. Panhandle Eastern Corp.* 73 F.E.R.C. ¶ 61,161 (1995). In *KansOk* and *Louisiana Gas*, the Commission exercised jurisdiction over chains of interconnected intrastate affiliates that collectively functioned as interstate pipe-

In its answer to protests filed in opposition to its petition for a declaratory order of exemption from NGA §§ 4 & 5 regulation, NorAm Field proposed, as an alternative, that the Commission only apply light-handed regulation of the affiliate's rates and services through future complaint mechanisms, if necessary. *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,865. This, in effect, is what the Commission has done. *Id.* at 61,871; *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,089–90. Recognizing that purportedly independent affiliates could circumvent the purposes of the NGA, the Commission took two preventive steps. First, "to guard against the risk of affiliate abuse, and to ensure an arms length relationship" between NorAm Gas and NorAm Field, it required NorAm Gas to add open-access, non-discrimination, and anti-tying provisions to its tariff. *See supra* n.12. Second, the Commission noted that certain types of "affiliate abuses"—including the giving of preferences and discounts to the affiliate's benefit, and other anticompetitive activity—would "trigger the Commission's authority to disregard" the affiliate's separate corporate structure. *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,871. Such circumstances, the Commission concluded, would empower it to "treat the pipeline and gatherer as a single entity," and thereby "regulate the gathering activities as it would if the gathering facilities were owned directly by an interstate pipeline." *Id.*[26]

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lines. By contrast, the Commission found NorAm Field exempt from NGA jurisdiction because it will engage in nonjurisdictional gathering. Hence, we find no inconsistency. As the Producers admit, "[i]t is one thing to argue that a non-jurisdictional affiliate can be created to perform non-jurisdictional activities," as NorAm Field seeks to do, and "it is another thing to allow a jurisdictional activity ... to become a non-jurisdictional activity through the creation of an affiliate," as the Commission refused to allow in *KansOk* and *Louisiana Gas*.

[26] The Commission explained in its initial decision:

> While the Commission generally does not have jurisdiction over affiliated gatherers because affiliates are not natural gas companies under the NGA, the Commission can exert control over the gathering activities of affiliated gatherers in particular

In sum, the Commission's position is that notwithstanding a gatherer affiliate's separate status under state corporation law, the affiliate may lose its status as an independent entity for purposes of the Act if it engages in anti-competitive activity with its affiliated pipeline. In a prior case involving a similar spin-down to a pipeline's subsidiary, the Commission had relied on

> [t]he general rule ... that an agency may disregard the corporate form in the interest of public convenience, fairness, or equity. This principle of allowing agencies to disregard corporate forms is flexible and practical in nature. Corporations may be regarded as one entity for the purposes with which the agency is immediately concerned even though they are legitimately distinct for other purposes.

Northwest Pipeline I, 59 F.E.R.C. ¶ 61,115 at 61,435 (quoting Opinion No. 255, 37 F.E.R.C. ¶ 61,149 at 61,356 (1986)). In the instant case, the Commission similarly concluded that while it has

> no authority to regulate an affiliated gatherer because it is not a natural gas company under the NGA ... if circumstances develop that would allow the pipeline and its affiliated gatherer to engage together in anticompetitive activity, the Commission will exert jurisdiction over

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circumstances where such action is necessary to accomplish the Commission's policies for the transportation of natural gas in interstate commence. More specifically, if an affiliated gatherer acts in concert with its pipeline affiliate in connection with the transportation of gas in interstate commerce and in a manner that frustrates the Commission's effective regulation of the interstate pipeline, then the Commission may look through, or disregard, the separate corporate structures and treat the pipeline and gatherer as a single entity, *i.e.*, a single natural gas company. In so doing, the Commission would regulate the gathering activities as it would if the gathering facilities were owned directly by an interstate pipeline.

Arkla I, 67 F.E.R.C. ¶ 61,257 at 61,871.

> the gathering service to the extent needed to preserve the Commission's statutory mandates under the NGA.

Arkla II, 69 F.E.R.C. ¶ 61,280 at 62,087 (citing *Northwest Pipeline I*, 59 F.E.R.C. ¶ 61,115 at 61,435–36). In other words, while the Commission believes it has no jurisdiction over gathering provided by a truly independent affiliate, it also holds that its jurisdiction over interstate transportation obligates it to ensure that there is no collusion between the interstate pipeline and the gatherers to manipulate the interstate market by determining who will have access to it. As with its treatment of the physical/nonphysical distinction, the Commission has rejected the Producers' request to regulate gathering rates directly and continuously, but has distinguished exceptional situations in which its regulation of interstate transportation would include regulation of gathering rates. In this sense, the Commission's position on this issue, far from being inconstant with its overall analysis, parallels its treatment of gathering in general. For instance, while the Commission does not believe it has the general authority to regulate gathering rates, it has never renounced its authority under *Colorado Interstate* to include gathering costs in the rate base for bundled sales or interstate transportation service. Thus, the Commission consistently maintains that when gathering is intertwined with jurisdictional activities, the Commission's regulation of the latter may necessarily impinge on the former.

It is in this light that we interpret the Commission's suggestion in its brief to the court that its exercise of jurisdiction over gathering affiliates is a discretionary matter entitled to judicial deference.[27] The Commission, if its jurisdictional analysis is correct, must determine in each instance whether the affiliate's behavior calls for federal intervention. As an abstract matter, we have no reason to doubt the

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[27] The Commission states in its brief that the "regulation of gathering rates is a matter delegated to the Commission to be determined in its discretion, and in this case, the Commission reasonably concluded that jurisdiction over [NorAm Field's] gathering rates is currently not called for."

Commission's conclusion that a nonjurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate pipeline to manipulate access and costs of gathering, the precise concern of the Eighth Circuit in *Northern Natural*, 929 F.2d at 1270, *supra* n.22. Furthermore, we are not in a position to evaluate this question other than as an abstract matter because the Commission has yet to assert its jurisdiction over a gathering affiliate. Both here and in *Northwest Pipeline I & II*, the Commission concluded that its stand-by jurisdiction was not called for under the circumstances. As suggested by the Tenth Circuit's decision to dismiss for want of a case or controversy the affiliate's petition in *Northwest Pipeline*, we cannot speculate about what circumstances might develop in the future that would cause the Commission to invoke the authority it seeks to reserve in the instant case. *Williams Gas Processing Co. v. FERC*, 17 F.3d 1320, 1321–22 (10th Cir. 1994). For now we conclude only that, as a conceptual matter, the Commission's position is not internally contradictory.

Accordingly, we deny the Producers' petitions challenging the Commission's determination that the gathering facilities at issue are exempt under NGA § 1(b).

III.

The Pipelines, in turn, attack the default contract condition, contending that the Commission exceeded the scope of "the express jurisdictional limitation on its powers contained in § 1(b) of the NGA."

Originally, the Commission found the authority to impose the default contract condition in its NGA § 7(b) power to determine whether the abandonment of facilities under its jurisdiction is in the public convenience and necessity.[28] The

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[28] Section 7(b) provides that:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained,

order in *Arkla I* differed from the later orders in imposing the condition directly on NorAm Field, rather than NorAm Gas. Twenty percent of the gathering facilities that NorAm Gas proposed to transfer to NorAm Field had been certificated pursuant to NGA § 7(c) when NorAm Gas included the facilities in year-end budgetary certificate reports.[29] *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,085. *See also Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,872. The Commission required NorAm Gas to file an abandonment application pursuant to § 7(b), despite NorAm Gas' protestation that the "mistakenly" certificated facilities were nonjurisdictional and hence not subject to the Commission's abandonment authority.[30] The

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> after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

15 U.S.C. § 717f(b) (1994).

[29] As a precondition to operation, a natural gas company must receive a certificate of public convenience and necessity from the Commission. Section 7(c)(1)(A) provides:

> No natural-gas company ... shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission ... or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

15 U.S.C. 717f(c)(1)(A) (1994).

[30] On rehearing, the Commission affirmed the § 7(b) filing requirement, notwithstanding NorAm Gas' objection that it had mistakenly included nonjurisdictional facilities in its year-end budget certificate reports. *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,085. The Commission reasoned that in so reporting these facilities, and benefitting from "the advantages bestowed by ... certification," such as the ability to attract customers through the stability of service implied by a certificate and the possibility of including the facilities' costs in NorAm Gas' bundled-service rate base, NorAm

Commission also ordered NorAm Gas to include specific non-discrimination standards in its interstate transportation tariff, and required NorAm Field to demonstrate that it had negotiated private contracts with NorAm Gas' existing gathering customers or offered them default contracts.

On rehearing, the Commission modified its approach in two respects. First, the Commission shifted the default-contract filing requirement from NorAm Field to NorAm Gas, disavowing any intention to impose a standard of conduct or otherwise regulate a non-jurisdictional entity.

> [W]e will require that either NorAm [Gas] or [NorAm Field] demonstrate that [NorAm Field] has negotiated private contracts with [NorAm Gas'] existing customers. If such a demonstration cannot be made ... NorAm [Gas] may submit a "default contract" or *pro forma* agreement which [NorAm Field] has offered to [NorAm Gas'] existing customers.

Arkla II, 69 F.E.R.C. ¶ 61,280 at 62,083. While continuing to find the public convenience and necessity dependent on dealings between NorAm Field and gathering service customers, the Commission placed the onus of warranting those dealings on NorAm Gas. Second, the Commission concluded that the condition was required not only by § 7(b) as it applied to the twenty percent of the facilities that were certificated, but also to all of the facilities, certificated or not, pursuant to NGA §§ 4 & 5. *Id.* at 62,082–83. Specifically, the Commission found that NorAm Gas' plan to cease providing gathering service in connection with its interstate transportation service constituted a "change in service," thus requiring a § 4(d) filing.[31] In § 4(e), the Commission found the authority to

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Gas had committed itself to seeking Commission authority to abandon them. *Id.*; *Arkla V*, 71 F.E.R.C. ¶ 61,297 at 62,164–65.

[31] Section 4(d) provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commis-

impose conditions necessary to make the proposed change just and reasonable.[32] The Commission concluded that an

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sion and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (1994).

[32] Section 4(e) provides, in pertinent part:

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect.... At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and

abrupt change in the regulatory status of NorAm Gas' gathering services would be unreasonable and unjust under §§ 4 and 5 because it would immediately eliminate NGA price and access protection upon which customers had come to depend. *Id.* at 62,082. In so concluding the Commission relied as well on "well established continuity of services principles."[33] *Id.* at 62,083. For it to find in the § 7(b) proceeding that the facilities abandonment was in the public convenience and necessity, and that the termination of service in the § 4 proceeding was just and reasonable, the Commission required NorAm Gas to "demonstrate that its existing customers will be guaranteed service after the facilities are transferred." *Arkla IV*, 70 F.E.R.C. ¶ 61,079 at 61,219.

The Commission rejected the Pipelines' argument that it was beyond the scope of NGA jurisdiction to require NorAm Field, a nonjurisdictional entity, to execute gathering agreements with NorAm Gas' existing customers. *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,081. The Commission's principal response was that permitting NorAm Gas to terminate its gathering services without adequate protection would frustrate the policy of promoting a competitive market, and that the Commission could use its § 4 authority to regulate nonjurisdictional activities performed "in connection with" jurisdictional service to prevent that outcome. The Commission noted that one of the goals of Order No. 636, namely to "ensure that all shippers have meaningful access to the pipeline transportation grid" in order to promote "competitive, national market" transactions, would be advanced by its assertion of "in connection with" authority in light of the

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decision of such questions preference over other questions pending before it and decide the same as speedily as possible. 15 U.S.C. § 717c(e) (1994).

[33] Although these principles were developed in connection with assessing the public convenience and necessity of § 7(b) abandonment of certificated facilities and services, the Commission concluded that similar principles must apply when addressing the termination of non-certificated jurisdictional services. *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,083 n.42.

Eighth Circuit's decision in *Northern Natural*, 929 F.2d 1261. *Id.* at 62,081 (citations omitted). As the Commission itself had concluded on another occasion:

> the section 4 and 5 grant of authority to regulate activities "in connection with" interstate transportation gives the Commission the discretion to regulate other aspects of the natural gas industry where necessary to make effective the Commission's primary jurisdiction over interstate transportation.

Northwest Pipeline II, 60 F.E.R.C. ¶ 61,213 at 61,729 (quoting *Northwest Pipeline I*, 59 F.E.R.C. ¶ 61,115 at 61,435–36 (quoting NGA §§ 4 and 5)). Or, as the Commission argues in its brief to the court, although "the *physical* gathering activities which [NorAm Field] will perform are exempt from the Commission's jurisdiction under § 1(b) . . . that is not to say they are also free of the Commission's term and rate authority under §§ 4 and 5." Brief for Respondent at 19 (citing *Northern Natural*, 929 F.2d at 1263). Applying the reasoning in *Northern Natural*, the Commission further concluded that failing to review the termination of gathering services here would create potential obstacles to open-access transportation by providing pipelines with the opportunity to grant undue preferences or advantages, and enable pipelines, in effect, to assume the Commission's congressionally-assigned role in determining whether rates are fair and just and whether proposed action by a pipeline is in the public interest. *Arkla II*, 69 F.E.R.C. ¶ 61,280 at 62,082.

The Commission had several other responses to the Pipelines' objection. In its view, "a natural corollary to the requirement to file . . . gathering rates is a requirement to submit for Commission review any proposal to change—or in this case to terminate—some or all of the rates or services embodied in the rates." *Id.* at 62,081–82. Also, concluding that "the states are not in a position to protect the expectations of existing customers at the point the pipeline decides to exit from the market for gathering," the Commission sought to avoid a "regulatory gap" contrary to congressional intent in enacting the NGA. *Id.* Finally, in the Commission's view, it

was not engaged in continuing regulation of NorAm Field, since once the gathering facilities were transferred and the contracts for continuity of service were in place, the Commission's involvement in these proceedings would be over. *Arkla IV*, 70 F.E.R.C. ¶ 61,079 at 61,219.

We conclude that the Commission has not identified any source of authority to impose the default contract condition. Granting the Commission's statutory interpretation due deference, the statute forecloses what appears to be the principal justification offered by the Commission: that the phrase "in connection with" in § 4 permits it to regulate facilities that it has expressly found are not within its § 1(b) jurisdiction. Where an activity or entity falls within NGA § 1(b)'s exemption for gathering, the provisions of NGA §§ 4, 5 and 7, including the "in connection with" language of §§ 4 and 5, neither expand the Commission's jurisdiction nor override § 1(b)'s gathering exemption. In language no less applicable here, the Supreme Court held in *Panhandle III*, 337 U.S. at 508–09, that

> [s]ections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather, they have reference to the interstate sale and transportation of gas and are so limited by their express terms. Thus §§ 4(a), (b), (c), 5(a) and 7(c) speak of "transportation or sale of natural gas subject to the jurisdiction of the Commission" while § 7(a) and (b) refer respectively to "transportation facilities" and "facilities subject to the jurisdiction of the Commission." Nothing in the sections indicates that the power given to the Commission over natural-gas companies by § 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.

See also Colorado Interstate, 324 U.S. at 602–03. Because the Commission concluded that the facilities to be transferred by NorAm Gas were exempt under § 1(b) as gathering facilities, and that NorAm Gas' independently operated affiliate gatherer was not a "natural gas company" subject to the

NGA, the Commission cannot simply assert authority over the facilities and the affiliate by invoking other sections of the Act.[34]

Nor are the Commission's other explanations for asserting §§ 4 & 5 authority adequate. Although a § 4(d) change-in-service filing may seem a "natural corollary" to the requirement to file gathering rates, what is natural may not always be part of the Act, and the Commission must explain how the NGA effectuates this corollary. The "regulatory gap" argument, depending on the inability of the states to protect existing customers, finds support in Supreme Court authority. *E.g., Louisiana Power*, 406 U.S. at 631. Nonetheless, the Commission did not explain why the states would be unable to protect NorAm Gas' customers, nor why the purported gap would be a two-year problem. Finally, the fact that the Commission's involvement would end once the contracts between NorAm Field and the NorAm Gas customers were signed does not explain why the Commission has the jurisdiction to be involved in the first place.

Likewise, there are difficulties with the Commission's reliance on § 7(b). As previously discussed, §§ 4, 5, & 7 do not expand the Commission's § 1(b) jurisdiction. Section 7(b) requires approval for abandonment of "facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities." This provision is no more an

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[34] Our concern with the Commission's statutory interpretation is reenforced by *Northwest Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493 (1989) (finding no preemption of a state law regulating natural gas production). There, the Court, observing that Congress "carefully divided up regulatory power over the natural gas industry" so as to "expressly reserv[e] to the States the power to regulate ... gathering," *id.* at 509–514, held that "[t]o find preemption of [a state's] regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production," *id.* at 514. The Court expressly cautioned once again against interpreting the Commission's powers over transportation and sales to include those areas reserved to the states. *Id.* at 512 (quoting *Panhandle III*, 337 U.S. at 513–14).

expansion of jurisdiction than is the "in connection with" language of § 4. In any event, while the record is not absolutely clear on the point, it appears that only twenty percent of the facilities to be transferred by NorAm Gas were ever certificated. As the Commission itself recognized, even if the abandonment authority could be invoked, it could apply to only that portion of the facilities. *Arkla I*, 67 F.E.R.C. ¶ 61,257 at 61,872.

Although we conclude that the Commission did not adequately explain its jurisdiction to condition approval of the spin-down of gathering facilities on a default contract mechanism, the Commission's options for assuring continuity of service and reasonable rates for gathering customers are not necessarily exhausted. There may be other alternatives that the Commission has not as yet explored, and we do not prejudge whatever efforts or determinations it may make in the future to address the spin-down phenomenon. In the orders under review, the Commission relied on an impermissible statutory interpretation to impose the default contract condition. Accordingly, we grant the Pipelines' petitions, deny the Producers' petitions, and remand the cases to the Commission.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 94-1724 **September Term, 1995**

Conoco Inc.,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

Vesta Energy Company, et al.,

Intevenors

Consolidated with 94-1726, 94-1729, 94-1730, 94-1731, 94-1732, 94-1735, 95-1007, 95-1013, 95-1080, 95-1172, 95-1342, 95-1364

BEFORE: Buckley, Sentelle and Rogers, Circuit Judges

ORDER

It is **Ordered**, by the Court, that the opinion filed herein on August 2, 1996, is amended, as follows:

At page 5, footnote 8, line 8

delete the words

and vacated

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX C

Arkla Gathering Services Company,
67 F.E.R.C. (CCH) ¶ 61257 (1994)

Arkla Gathering Services Company
Docket No. CP94-36-000

FEDERAL ENERGY REGULATORY COMMISSION

Preliminary Determination on Jurisdictional Status of Facilities

May 27, 1994

PANEL:

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, William L. Massey, and Donald F. Santa, Jr.

OPINION:

On October 21, 1993, Arkla Gathering Services Company (Gathering Company) filed a petition for declaratory order requesting a determination that certain facilities that Gathering Company intends to acquire from Arkla Energy Resources Company (AER), its affiliate, will be gathering facilities exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act (NGA). We find that the facilities will be exempt

gathering facilities under NGA section 1(b) upon their acquisition by Gathering Company, contingent on AER and Gathering Company meeting the additional conditions discussed below.

I. Background and Proposal

Gathering Company states that it intends to acquire the on-shore gathering systems, related metering and other appurtenant equipment currently owned and operated by AER. The subject facilities are located in 105 areas in Arkansas, Louisiana, Oklahoma, and Texas.

Gathering Company's pleadings and responses to data requests include maps and information that set out for each area: (1) the geographic configuration of the systems; (2) the diameter and length of pipelines in the systems; (3) the compressors; (4) the pressure of the lines; (5) the custody transfer points of the gas; and (6) the number of wells attached to the pipelines in each area.

Gathering Company states that the combined facilities consist of approximately 2,775 miles of pipelines that are attached to approximately 3,900 active wells. Approximately 2,000 additional wells are flowing gas into the subject facilities through interconnections with third-party gatherers. In addition, another 1,300 wells are presently either inactive or split connected and producing into competitors' gathering systems. The subject facilities are described in greater detail in Appendix A to this order.

Gathering Company points out that: 11 of the subject areas have 100 or more wells connected to them; 34 have between 20 and 99 wells; 36 areas have between four and 19 wells; and 24 have fewer than four wells. Gathering Company states that of the 24 areas with fewer than four wells, 64 of a total of 67 pipelines in the areas are between 2 and 6 inches in diameter.

Gathering Company also points out that almost 90 percent of the pipelines in the 105 subject areas are 6 inches or less in diameter, and that approximately 98 percent of the lines are 8 inches or less. It also states that any compression performed in the subject areas is necessary to move low-pressure gas through the fields.

Gathering Company states that all of the subject facilities currently are classified by AER as gathering,[1] and that none of the facilities is certificated under NGA section 7(c). However, Gathering Company points out that some of the facilities may have been reported in AER's year-end budgetary certificate reports. It claims, however, that those facilities were not constructed under AER's budget-type certificate and that the reports were in

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[1]Arkansas Royalty and Indicated Shippers maintain that AER has claimed in prior rate cases that some of the subject facilities are transmission in nature. However, the Commission has indicated that the criteria for determining how particular facilities are treated for purposes of rate cases are different from those for determining whether the same facilities are jurisdictional under NGA section 1(b). See Arkla Energy Resources, 63 FERC 61,265, at 62,719 n.25 (1993); Trunkline Gas Company, 58 FERC 61,240, at 61,792 (1992).

error.[2] Gathering Company also states that after the facilities are transferred, it intends to perform the same gathering functions that AER is currently performing except that it will conduct its business separate from AER's. Therefore, Gathering Company claims that the facilities should continue to be exempt from Commission jurisdiction under NGA section 1(b) upon its acquiring them.

In its petition for declaratory order, Gathering Company argued that its prospective gathering rates and services also should be declared exempt from the Commission's jurisdiction. Gathering Company contended that the Commission's treatment of similar rates and conditions and/or terms of service in Northwest Pipeline Corp. (Northwest)[3] and Panhandle Eastern Pipe Line Co. (Panhandle)[4] would be unjustified here. In those cases, the Commission determined that it had the discretion to exert jurisdiction over the rates and terms and conditions

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[2]In response to a data request, Gathering Company lists approximately 600 of the subject pipelines that were identified in AER's year-end budget reports.

[3]Northwest Pipeline Corp., 59 FERC 61,115, reh'g denied, 60 FERC 61,213 (1992), appeal dismissed sub nom. Williams Gas Processing Co. v. FERC, No. 92-9553 (10th Cir., Feb. 28, 1994). In dismissing the appeal of the Commission's decision, the court ruled that there was no case or controversy because the Commission had not asserted jurisdiction or implied that it had jurisdiction over Williams Gas Processing Co. at the present time.

[4]Panhandle Eastern Pipe Line Co., 62 FERC 61,027, reh'g denied, 65 FERC 61,167 (1993).

of service of gathering activities of a pipeline affiliate when those activities were performed in connection with interstate transportation of gas by the pipeline. However, the Commission found it unnecessary to exert jurisdiction over the pipeline affiliate unless the affiliate used its relationship with the pipeline to engage in anticompetitive activities. In a subsequent filing, however, Gathering Company requests that the Commission grant it the same treatment applied in Northwest, Panhandle, and other recent orders.[5]

II. Procedural Matters

A. Interventions

Notice of the petition for declaratory order was published in the Federal Register on November 1, 1993 (58 Fed. Reg. 58,333). Numerous motions to intervene and notices of intervention were filed. Timely unopposed motions to intervene and notices of intervention are granted by operation of Rule 214 of the Commission's regulations.[6] n6 Texaco Gas Marketing Inc. and Williams Field Services Mid-Continent Region Company tendered untimely, unopposed motions to intervene. They have shown an interest in this proceeding, and their participation, we find, will not delay the proceeding or prejudice the rights of any other party. Accordingly, for

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[5]See Mid Louisiana Gas Co., 65 FERC 61,166 (1993); KN Energy, Inc. (KN Energy), 65 FERC 61,168 (1993), reh'g denied, 66 FERC 61,171 (1994).

[6]18 C.F.R. 385.214 (1993).

good cause shown, we will grant the late motions to intervene. Appendix B to this order lists all intervenors.

B. Protests and Answers

Protests to the petition were filed by Arkansas Gas Consumers (Arkansas Consumers), the Arkansas and Louisiana Public Service Commissions, jointly (the State PSCs), Arkansas Royalty Membership (Arkansas Royalty), Indicated Shippers, Phillips Petroleum Company and GPM Gas Corporation, jointly (Phillips), Samson Resources Company and Oklahoma Independent Petroleum Association, jointly (Samson), and Sonat Marketing Company (Sonat).

Gathering Company filed a motion for leave to file an answer to the protests. It claims that its answer is warranted in order to correct and complete the record. Upon reviewing the notice convening a public conference, issued in Docket No. RM94-4-000,[7] Gathering Company states that it determined that the Commission may be hesitant to grant its original request that its prospective rates and services be declared non-jurisdictional. Therefore, its answer "proposes a more reasoned and

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[7]Natural Gas Gathering Services Performed By Interstate Pipelines and Interstate Pipeline Affiliates -- Issues Related To Rates and Terms and Conditions of Service, issued October 28, 1993. The public conference took place on February 24, 1994, and explored the extent to which the Commission should exercise its rate and tariff jurisdiction, under NGA sections 4 and 5, over the rates and/or terms and conditions for gathering services performed by interstate pipelines and their affiliates.

reasonable approach"[8] by requesting that the Commission only apply light handed regulation over Gathering Company's rates and services through future complaint mechanisms, if necessary. Gathering Company states that it is not withdrawing its original request for a determination that it would be exempt from the Commission's sections 4 and 5 jurisdiction. It requests that the Commission grant its revised request now, and then review its original request after the court issues its opinion in the Northwest proceeding and after the Commission completes the process initiated in Docket No. RM94-4-000.

Indicated Shippers and Arkansas Royalty filed answers opposing Gathering Company's motion for leave to file an answer to the protests. They point out that the answer is forbidden by the Commission's rules. Indicated Shippers argues that the answer actually is an amendment to the petition for declaratory order and violates the protestants' right to be heard in response. Similarly, Arkansas Royalty contends that the parties have been denied adequate time to submit a thorough response. Both parties request that Gathering Company's motion be denied. Alternatively, Indicated Shippers requests additional time to respond.

On January 19, 1994, the Commission issued a Notice of Extension of Time for parties to respond to Gathering Company's answer. Indicated Shippers filed an answer, but Arkansas Royalty did not.

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[8]Gathering Company's answer to the protests, at p. 2.

Vesta Energy Company (Vesta) also tendered for filing an answer to the protests. It adopts and supports the protests filed by Arkansas Consumers, Sonat, and Arkansas Royalty, as well as comments filed by Oryx Gas Marketing Company (Oryx).[9] Noark Pipeline System, Limited Partnership (Noark) also tendered for filing an answer to the protests in support of Gathering Company's petition.

While our rules do not permit answers to protests,[10] we may, for good cause, waive a rule.[11] We find good cause to do so in this instance. In its answer, Gathering Company provides additional, relevant information concerning the subject facilities, and it modifies its position concerning the Commission's jurisdiction over its prospective rates and services. Accordingly, we will accept Gathering Company's answer to the protests, noting the opportunity given to all parties to respond to it. Similarly, to achieve a complete and accurate record, we will accept all pleadings tendered to date for filing.

On March 21, 1994, Arkansas Royalty filed a motion requesting that the Commission require Gathering

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[9]Although Oryx did not file a protest, in its motion to intervene it requests that the Commission carefully consider the practical and policy ramifications that Gathering Company's proposal will have on the objectives of Order No. 636. Arkansas Royalty, Indicated Shippers, and Samson express similar concerns.

[10]See 18 C.F.R. 385.213(a)(2) (1993).

[11]18 C.F.R. 385.101(e) (1993).

Company to supplement its petition for declaratory order with certain additional information. Specifically, Arkansas Royalty requests that Gathering Company file additional information including: (1) more specific maps; (2) evidence that Gathering Company will provide access to other interstate pipelines; (3) the net book value of each of the facilities to be transferred; and (4) evidence on how Gathering Company will determine its gathering rates in the areas where no competition exists. Oklahoma Independent Petroleum Association and Producer-Market Transportation Group Gathering Coalition (filing jointly), Indicated Shippers, and Vesta filed answers in support of Arkansas Royalty's motion. Finally, Gathering Company filed an answer in opposition to the motion.

We will deny Arkansas Royalty's motion. The motion merely reiterates arguments alleging insufficient information that Arkansas Royalty presented in its protest. As discussed below, we find that the existing record is sufficient to enable the Commission to reach a fully informed decision in this preliminary determination.

C. Request for Joinder of Parties

Indicated Shippers contends that the true facts cannot be established unless the Commission joins additional parties to this proceeding. Specifically, Indicated Shippers requests that the Commission join AER, Arkla Pipeline Group, Texas Eastern Transmission Corporation (Texas Eastern), and ANR Pipeline Company (ANR) as parties to this proceeding. Indicated Shippers states that AER and Arkla Pipeline Group are affiliated

with Gathering Company and that Texas Eastern and ANR have proceedings currently pending before the Commission that pertain to certain of the gathering facilities.[12] Indicated Shippers argues that the Texas Eastern and ANR proceedings involve issues relevant to the Commission's determination here.

We will deny Indicated Shippers' request. We find that the existing record is sufficient to resolve fully all issues in this preliminary determination, and that nothing would be gained by granting Indicated Shippers' request. We note, however, as discussed below, AER will need to file an application to abandon any certificated facilities. Further, we note that Texas Eastern's application in Docket No. CP93-598-000 was withdrawn on November 16, 1993.

D. Requests for Hearing And/Or Technical Conference

In their protests, several parties request a full evidentiary hearing and/or technical conference.[13] Arkansas Royalty, Indicated Shippers, and Phillips argue that Gathering Company has not provided sufficient

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[12]Indicated Shippers cites Docket No. CP93-598-000, in which Texas Eastern proposed to acquire a leasehold in certain AER gathering facilities, and Docket No. CP89-2195-002, in which ANR proposed to acquire an interest in certain AER transmission (but not gathering) facilities.

[13] Arkansas Royalty, Indicated Shippers, Phillips, Samson, and the State PSCs.

information for the Commission to determine if the subject facilities are exempt as gathering under NGA section 1(b).

The requests are denied. An evidentiary trial-type hearing is necessary only where material issues of fact are in dispute that cannot be resolved on the basis of the written record.[14] No such material issues of fact are present here. By accepting all tendered pleadings discussed above, the Commission has achieved a complete record for this preliminary determination and given all parties an adequate opportunity to be heard. For the same reasons, we find no need to convene a technical conference.

III. Discussion

A. Jurisdictional Status of the Facilities

Under section 1(b) of the NGA, the Commission has jurisdiction to regulate the transportation and sale for resale of natural gas in interstate commerce and any natural gas company engaged in such transportation or sale. At the same time, section 1(b) exempts from Commission jurisdiction the "production or gathering of

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[14]See, e.g., Southern Union Gas Co. v. FERC, 840 F.2d 964, 970 (D.C. Cir. 1988); Cerro Wire & Cable Co. v. FERC, 677 F.2d 124 (D.C. Cir. 1982); Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

natural gas."[15] The courts have narrowly construed the section 1(b) gathering exemption to apply to the physical activities of gathering.[16]

The primary function test articulated in Farmland Industries, Inc.,[17] as modified in Amerada Hess Corporation, et al.,[18] is the standard used to determine whether specific facilities are gathering or transmission in nature. Among other things, the primary function test considers the following factors: (1) the length and diameter of the lines; (2) the extension of the facility beyond the central point in the field; (3) the lines' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the lines. No one factor is determinative, nor do all factors necessarily apply to all situations.[19]

Applying the primary function test to the facts of this case, we conclude that the facilities will perform

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[15]18 U.S.C. 717(b).

[16]Transcontinental Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409, 418 (1986) (quoting Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 90 (1963)). See also Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 510 (1989).

[17]Farmland Industries, Inc., 23 FERC 61,063 (1983).

[18]Amerada Hess Corp., 52 FERC 61,268 (1990).

[19]Arkla's facilities are not located on the Outer Continental Shelf (OCS). A separate analysis is necessary for facilities on the OCS. See EP Operating Co. v. FERC, 876 F.2d 48 (5th Cir. 1989).

primarily a gathering function upon their acquisition by Gathering Company, and, accordingly, will be exempt from the Commission's jurisdiction under NGA section 1(b). In reaching our conclusion, we rely on the facts surrounding AER's operation of the facilities, and Gathering Company's representation that it will operate the systems in essentially the same manner.

1. Length and Diameter of the Lines

The petition for declaratory order lists 3,138 segments of pipeline to be transferred. Generally, the pipelines are short in length and small in diameter, which is consistent with a gathering determination.

Most of the pipelines range in length from a few hundred feet to a few miles. All but 15 of the 3,138 pipeline segments are less that 8 miles in length.[20] Each of the pipeline segments that is longer than 8 miles forms the backbone or spine of a system. As backbone pipelines, they collect gas from numerous feeding lines along their entire length. This type of backbone pipeline is consistent with a gathering determination.[21]

The diameters of the pipelines in all but one of the areas range in size from 2 to 10 inches. Ninety percent of the pipelines are 6 inches or less in diameter, and 98

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[20]Fourteen of these pipeline segments are between 8 and 13.6 miles in length. The Waskom Area contains the longest pipeline, approximately 26 miles long, but it is only 3 inches in diameter.

[21]Northwest, 59 FERC at 61,434.

percent of the lines are 8 inches or less. These smaller diameter pipelines are consistent with a gathering determination. There are 14 pipelines that are 10 inches in diameter. These 10-inch pipelines form the backbones of their systems. Numerous smaller pipelines feed into them. The largest diameter pipeline is in the Mathers Ranch Area, which consists of one 4.7 mile segment of 12-inch pipeline. The pipeline currently is attached to one well, but has numerous tap locations for connections to producer owned lines. A short pipe that is only attached to one or a few wells is indicative of a gathering pipeline.[22]

2. Central Point in the Field

The second criterion of the primary function test requires consideration of whether the facilities extend beyond a central point in the field. The central point in the field test is based on the idea that gathering involves the collection and movement of natural gas through various lines to a central point where the gas is delivered into a single line for transmission. Any facilities located upstream of the central point are considered non-jurisdictional gathering facilities. This test is usually considered in situations where no processing plant is included in the system configuration.[23] The central point

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[22]See KN Energy, 65 FERC at 61,852-853.

[23] See Tennessee Gas Pipeline Co., 47 FERC 61,029 (1989); Shell Oil Company and Chapparo Gathering Co., 24 FERC 61,371 (1983).

in the field test applies to many, or portions of many, of the subject areas.

On the other hand, as discussed, several of the areas consist of pipelines that form a backbone-type structure, or short pipelines that are attached to one or a few wells. The central point in the field test does not apply to these types of facilities.

3. Geographic Configuration

The subject facilities generally fall into three types of geographic configurations. One is the web-like configuration commonly found in field gas gathering systems. Many of the subject facilities display this type of configuration.

The second configuration involves the backbone-type structure, which consists of a pipeline that connects to numerous feeding lines along its entire length. The Amber and Sickles Areas in Oklahoma are examples of this type of system.

The third type of configuration, found in several of the smaller systems, consists of short, small diameter pipelines that connect a few wells directly into the transmission system. The Buffalo Wallow Area is an example of this type of system. Generally, all three types of configurations are consistent with a gathering determination.

Although many of the subject areas consist of only one type of configuration, several of the areas contain combinations of all three. For example, gas in the Enid Area is delivered to five custody transfer points on AER's transmission system. One transfer point is connected to a central compressor facility into which feed several pipelines connected to many wells. Two custody transfer points are connected to backbone-type structures. The final two transfer points are connected to one or two small pipelines that connect one or two wells directly to the transmission system.

4. The Location of Compressors and Processing Plants

Twenty-eight of the areas contain 71 field compressors. According to Gathering Company, the compression performed by these facilities is necessary to boost low-pressure gas from the field. This type of minimal compression is consistent with a primary function of gathering.[24] We note that there are no gathering facilities downstream of any processing plants.

5. Location of Wells

This criterion, which requires that wells be located along all or part of the facilities, is satisfied for each area. There are 3,977 wells attached to pipelines in 103 of the areas. Two areas are listed as having no wells attached to

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[24]See Manchester Pipeline Corp., 46 FERC 36,356 (1989).

the pipelines. These areas are currently inactive.[25] Additionally, Gathering Company has stated that an estimated 2,000 additional wells are flowing gas into the subject facilities through interconnections with third-party gatherers. Another 1,300 wells are either inactive or split connected and producing into competitors' gathering systems.

As stated, 11 of the areas have 100 or more wells connected to them. Thirty-four have between 20 and 99, and 36 have between four and 19 wells. Twenty-four areas[26] have less than four wells. Of these 24 areas, 21 consist of very small diameter pipelines, usually 2 to 6 inches, that connect to each well. The Deer Creek and Mayflower Areas have 4-inch pipelines attached to the wells and 8-inch backbone-type pipelines to collect the gas.

6. Operating Pressure of the Lines

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[25]Attachment A to Gathering Company's answer to the protests lists three areas, the Canute, Holdenville, and Lillie Areas, with no well connections. In response to a data request, however, Gathering Company states that there are currently three wells in the Canute Area.

[26]Ada, Ames, Athens, Bloomington, Braman, Canute, Cedar Springs, Chitwood, Geary, Gotebo, Holdenville, Indianapolis, Jesse, Lillie, Mayfield, Metcalf, Missionary Lake, Oakman, Peek, Quitman, and Stigler. The last of the 24 areas is Mathers Ranch, which is a short pipeline attached to one well. Under the location of wells criterion, we conclude that all of the systems are indicative of gathering.

A majority of the areas operate at pressures below 500 psig. Thirty-six operate at pressures below 400 psig. Eight of these 36 areas operate at less than 150 psig.[27] Forty of the areas operate at pressures above 500 psig. Eighteen of these 40 operate up to or over 900 psig.[28] Ten areas are currently inactive.[29] In response to a data request, Gathering Company states that the higher pressure systems do not have central point compression, and that the operating pressures are determined by the wellhead pressures of the wells. In other situations, Gathering Company states that the producers have installed individual wellhead compressors. These facts are consistent with a gathering determination. In sum, we conclude that all of the subject areas satisfy this criterion of the primary function test.

7. Observations and Conclusions

All of the 105 systems, except for the Mathers Ranch Area, are comprised of pipeline segments smaller that 10 inches in diameter. Ninety percent of the pipelines are 6 inches or less in diameter. Most of the

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[27] Bradley, Calhoun, Carthage, Deek Creek, Gragg, Jefferson, Jesse, and Metcalf.

[28] Apache, Buffalo Wallow, Butler, Chickasha, Hinton, Indianapolis, Indian Rock, Leedy, Mayfield, Midway, Oakman, Panola, Red Oak, Sickles, Stiles Ranch, Strong City, Tatum, and Weatherford.

[29] Ada, Braman, Hamon-Locke sub-area, Holdenville, Jerusalem, Lillie, Mayflower, Peek, Terryville, and Whelan.

pipelines also are short in length. The longer ones are backbone-type pipelines that collect gas from numerous feeding lines. Many of the areas connect to more than a few wells, are web-like in configuration, and are located upstream of a central point in the field. The few exceptions consist mainly of small fields with limited well connections and small diameter pipelines, or of backbone-type pipelines. The compressors found in 28 of the areas primarily aid in moving otherwise low-pressure gas through the systems. Finally, the areas that operate at high pressures do so primarily because they are connected to high pressure wells.

Accordingly, we conclude that all 105 systems qualify as gathering systems under the primary function test. Therefore, once the preconditions discussed below are satisfied, and upon the transfer of the subject facilities to Gathering Company, the facilities will be exempt from the Commission's jurisdiction under NGA section 1(b).

B. Jurisdiction Over Gathering Company's Prospective Rates and Services

1. The Parties' Arguments

Several parties[30] argue that, under the court's ruling

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[30]Arkansas Royalty, Arkansas Consumers, Indicated Shippers, and th e State PSCs.

in Northern Natural Gas Company (Northern Natural),[31] the Commission has a statutory mandate to exert full NGA sections 4 and 5 jurisdiction over the rates charged by Gathering Company "in connection with" AER's jurisdictional interstate transportation, to assure just and reasonable rates. The parties claim that the Commission's regulation under the NGA is mandatory and not discretionary, and that anything less than full regulation of Gathering Company's rates would be an unlawful abdication of the Commission's responsibility under the NGA.

Several parties[32] also argue that if the Commission does not regulate Gathering Company's rates and services, Gathering Company and AER will use their substantial market and monopoly power to frustrate open-access to AER's interstate transmission system through Gathering Company's gathering rates and/or terms and conditions of service. Indicated Shippers argues that a Federal Trade Commission (FTC) finding[33] that certain markets in the

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[31]929 F.2d 1261 (8th Cir. 1991), cert. denied, 112 S.Ct. 169 (1991).

[32] Arkansas Royalty, Indicated Shippers, Phillips, Samson, and Sonat.

[33]In 1986, Arkla, Inc. (Arkla) acquired an interstate pipeline that roughly parallelled its mainline in central and western Arkansas. The FTC initiated an investigation of the acquisition that resulted in Arkla's entering into a
settlement, without acknowledging or disclaiming the FTC's allegations, to divest itself of certain assets, some of which included gathering facilities. See In the Matter of Arkla, Inc., 112 FTC 509

Arkoma Basin in Arkansas are highly concentrated is evidence of a lack of competition in that area and of the potential for Gathering Company to behave in an anticompetitive manner.

Arkansas Royalty claims that Gathering Company will shift costs to captive supplies to compete better where there are other service alternatives. It contends that less attractive wells with no competitive alternatives will face increasingly higher rates and may be abandoned prematurely. Sonat and Samson advance similar arguments.

Phillips, Indicated Shippers, and Arkansas Royalty argue that Gathering Company has not demonstrated that the potential for abuse of the affiliate relationship does not exist. Indicated Shippers states that AER should be required to add to its tariff a guarantee of access to its mainline facilities for all gatherers. Similarly, Phillips states that the Commission should consider some appropriate limitation to protect parties against discrimination in favor of the affiliated gatherer. All of these parties, and the State PSCs, request that the Commission require Gathering Company to show evidence of sufficient competitive alternatives from wellhead to transmission interconnect for each gathering area.

Arkansas Royalty, Indicated Shippers, Orxy, and

(1989).

Samson argue that the proposed transfer would frustrate the Commission's Order No. 636[34] competitive objectives. Arkansas Royalty argues that the operational and physical interrelationship of the gathering facilities and mainline transmission system is such that the two cannot be operated independently without threatening the goals of Order No. 636. Indicated Shippers maintains that AER's Order No. 636 compliance orders imposed access conditions on gathering that AER will simply walk away from by transferring the facilities.

Several parties argue that Gathering Company should be required to honor prior contractual and/or regulatory obligations. Specifically, Samson states that an integral part of the rate settlement in Docket No. RP93-3-000 was an agreement that AER would charge a gathering rate no higher than 14.17 cents per MMBtu. It argues that AER must not be able to evade that bargain by transferring the facilities to a non-jurisdictional company. The State PSCs request that the Commission cap Gathering Company's maximum gathering rates at the level approved in Docket No. RP93-3. Samson also argues that Gathering Company should be required to honor AER's contracts for discounted transportation.

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[34]Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (April 16, 1992), III FERC Stats. and Regs. 30,939 (April 8, 1992); order on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), III FERC Stats. and Regs. 30,950 (August 3, 1992); order on reh'g, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC 61,272 (November 27, 1992).

Arkansas Royalty argues that many lines were paid for by producers as "aid-in-construction," and that they have relied on Commission regulation to ensure that AER will not double recover costs. Arkansas Royalty also points out that some producers are getting free gathering services as non-cash consideration under take-or-pay and buydown settlements, and it is concerned about the status of those agreements after the transfer.

In its answer to the protests, Gathering Company claims that the involved facilities are subject to substantial competition. Specifically, it points out that in a response to a data request it provided a list of over 400 gatherers operating in the same areas where the subject facilities are located. It also states that sections 7 and 8 of the Transfer Agreement between Gathering Company and AER provide that both companies will observe principles of open-access and refrain from acting in an unduly discriminatory manner. Sections 7 and 8 of the Transfer Agreement read as follows:

> 7.1 In providing any services to each other, Transferee and Transferor will provide such services in a manner not inconsistent with principles of open-access.
>
> 7.2 Transferee and Transferor will refrain from charging prices or imposing terms and conditions for services which are intended to discourage or deny any shipper access to any transmission system and will operate their businesses in a manner consistent with applicable laws requiring conduct

which is not unduly discriminatory.

> 8.1 After transfer of the Assets to Transferee, Transferor will take no unreasonable action or make no unreasonable change to its currently existing operating practices, at any existing or future receipt point between its facilities and the gathering facilities of Transferee acquired hereunder, that would deny the receipt of gas into Transferor's system.[35]

Furthermore, in its answer to the protests, Gathering Company states that it will honor all long-term commitments, including any which deal with contributions in aid-in-construction and discounts.

Arkansas Royalty challenges Gathering Company's statement that the Transfer Agreement provides open-access and non-discriminatory protection. Specifically, Arkansas Royalty states that the Transfer Agreement only creates rights between Gathering Company and AER, and expressly provides that it is not intended to create any third-party beneficiary rights.[36] Similarly, Indicated Shippers states that the Transfer Agreement does not alleviate any concerns of potential

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[35]Petition for declaratory order, Appendix A at pp. 7 and 8.

[36]Section 11.2 of the Transfer Agreement states that: "Nothing in theTransfer Agreement is intended or will be construed to confer upon or give any person or entity other than the parties hereto any rights or remedies under or by reason of the Transfer Agreement of any transaction contemplated hereby."

discrimination.

Arkansas Royalty and Indicated Shippers disagree with Gathering Company's contention that there is substantial competition in the subject areas. Arkansas Royalty claims that Gathering Company's information is unreliable and should be discounted.

Noark, in comments supporting Gathering Company's petition, states that it will compete with Gathering Company for supply in Arkansas. Noark agrees with the protestants that there is currently minimal competition in the subject gathering areas. However, it contends that this is the result of past regulation, and that deregulation is necessary to attract the capital that is needed to modernize existing systems and meet production needs.

12. Commission Response

First, we address those protestants who argue that Commission regulation of a pipeline gathering affiliate is mandatory. Section 1(b) of the NGA gives the Commission jurisdiction over (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural gas companies engaged in such transportation or sale. Section 2(6) of the NGA defines "natural gas company" as a person engaged in the transportation of natural gas in interstate commerce or the sales of such gas in interstate commerce for resale. Interstate pipelines are

natural gas companies, and the Commission's jurisdiction to regulate pipeline activities includes gathering. Although, the Commission's mandate under the NGA and its primary rate jurisdiction is with respect to interstate transportation, not gathering, in Northern Natural the U.S. Court of Appeals for the Eighth Circuit confirmed that under NGA sections 4 and 5 the Commission may regulate rates charged for gathering services provided by natural gas companies (i.e., pipelines) "in connection with" the pipelines' jurisdictional interstate transportation.

However, companies that perform only a gathering function, whether they are independent or affiliated with an interstate pipeline, are not natural gas companies because they neither transport natural gas in interstate commerce, nor sell such gas in interstate commerce for resale. Therefore, the Commission does not have jurisdiction over such companies whether they are independent or affiliated with an interstate pipeline. While the Commission generally does not have jurisdiction over affiliated gatherers because affiliates are not natural gas companies under the NGA, the Commission can exert control over the gathering activities of affiliated gatherers in particular circumstances where such action is necessary to accomplish the Commission's policies for the transportation of natural gas in interstate commerce. More specifically, if an affiliated gatherer acts in concert with its pipeline affiliate in connection with the transportation of gas in interstate commerce and in a manner that frustrates the Commission's effective regulation of the interstate pipeline, then the Commission

may look through, or disregard, the separate corporate structures and treat the pipeline and gatherer as a single entity, i.e., a single natural gas company. In so doing, the Commission would regulate the gathering activities as it would if the gathering facilities were owned directly by an interstate pipeline.[37]

The types of affiliate abuses which would trigger the Commission's authority to disregard the corporate form would be limited to abuses arising specifically from the interrelationship between the pipeline and its affiliate. That is, a complainant would have to allege that the pipeline would benefit by certain actions taken by the affiliate in conjunction with its affiliated pipeline. Such actions might include the affiliate's giving preferences to market affiliate gas or tying gathering service to the pipeline's jurisdictional transmission service; the pipeline's giving transportation discounts only to those utilizing the affiliate's gathering service; and actions resulting in cross-subsidization between the affiliate's gathering rates and the pipeline's transmission rates. Although an

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[37]The Eight Circuit held in Northern only that the Commission may regulate pipeline-owned gathering that is "in connection with" the pipeline's jurisdictional transportation. Notwithstanding the footnote in that case that might be construed to the contrary, the issue of whether the Commission has similar jurisdiction over pipeline-affiliated gatherers was not before that Court. We do not believe that section 4 and 5 of the NGA nor the holding in Northern support the view that the Commission has jurisdiction over rates for gathering services that are "in connection with" interstate gas transportation if those services are not provided by a "natural gas company."

affiliate could undertake other types of anti-competitive activities, the Commission's jurisdiction would be implicated only where the abuse is directly related to the affiliate's unique relationship with an interstate pipeline. Except where the Commission finds that a pipeline and its gathering affiliate should be treated together as a single "natural gas company," the affiliated gatherer would be subject to state, not Federal jurisdiction.

Moreover, to guard against the risk of affiliate abuse, and to ensure an arms length relationship between the pipeline and an affiliated gathering company, we believe the pipeline must include in its tariff the following standards:

(a) AER will provide nondiscriminatory access to all sources of supply in accordance with Part 284 of the Commission's regulations and will not give shippers of its gathering affiliate undue preference over shippers of nonaffiliated gatherers or other customers in scheduling, transportation, storage or curtailment priority.

(b) AER will not condition or tie its agreement to provide transportation service to an agreement by the producer, customer, end-user, or shipper relating to any service by any gathering affiliate, any services by it on behalf of its gathering affiliate, or any services in which its gathering affiliate is involved.

We will condition the abandonment authorization

discussed below in section C.2. upon AER's filing tariff provisions containing the standards of conduct described above.

Accordingly, we disagree with the protestants who urge that the Commission must regulate all affiliate gathering. The Commission's jurisdiction to regulate affiliate gatherers is indeed limited, as discussed above.

Some protestants argue that in the absence of competition for gathering, the Commission must regulate an affiliated gatherer. We disagree. As we discuss in more detail in Mid Louisiana Gas Company, et al., (Mid Louisiana)[38] which the Commission is considering concurrently with the instant case, the presence or absence of gathering competition in a particular area has no bearing on the Commission's authority to regulate affiliated gatherers. As discussed above, an affiliate is not a natural gas company. Moreover, as we also discuss in Mid Louisiana, it would be unreasonably burdensome and time consuming to attempt to gage the level of competition for the gathering services at issue in this proceeding.

Nevertheless, we recognize that in the past, the Commission has fully regulated gathering by interstate

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[38]In Docket No. CP93-79-001, the Commission is acting on a request for rehearing of its order in Docket No. CP93-79-000 in which the Commission permitted Mid Louisiana Gas Company to abandon gathering facilities by transfer to its affiliate, Fairbanks Gathering Company.

pipelines under a cost-based regime. The pipelines' historical obligation to its gathering customers and the Commission's later requirement for open access transportation created an expectation that the relationship between the pipelines and producers connected to their gathering systems would be governed by regulation, not private contract. Because of the current absence of comprehensive contracts, in instances like the one here, where a pipeline is proposing to transfer its gathering operations to a non-pipeline entity, the existing customers could find themselves unable to contract for service of the pipeline's successor in interest. We agree that existing customers have a reasonable expectation that their service will not be arbitrarily terminated in the event of a spin-down or spin-off or only offered undue unreasonable terms, conditions and rates.

Therefore, as a precondition to a final determination that the subject facilities will be exempt from our jurisdiction, Gathering Company must demonstrate that it has negotiated private contracts with AER's existing customers. If Gathering Company is unable to reach agreement with AER's existing customers (or where most producers have entered into contracts, but there are a few holdouts), Gathering Company may submit a "default contract" or pro forma agreement which has been offered to existing customers. The terms for service should not be inconsistent with the terms, conditions and rates for various services currently offered by independent gatherers in the particular region. If we conclude that the "default contract" meets this standard, we will issue a final declaratory order. Existing customers

who choose not to take service under these terms, conditions and rates will not be guaranteed continuation of service. By giving AER's existing customers an opportunity to negotiate contracts with Gathering Company prior to issuance of a declaratory order and providing a default standard for such contracts where the parties cannot otherwise devise mutually agreeable terms, conditions and rates, the Commission eliminates to the extent possible any advantage Gathering Company has over captive gathering customers.

C. Other Matters

1. Valuation Issue

Gathering Company indicates that the facilities will be transferred at net book value. Phillips is concerned that AER will charge its customers for stranded gathering costs. Phillips also argues that transferring the facilities at net book value may not be adequate to represent the true market value of the assets. It states that this may give Gathering Company an unfair advantage because the depreciated value of the facilities may be artificially low. Phillips recommends that the Commission require "AER to hold an 'open season' to bid for the facilities . . . [and to] require AER to accept the highest bid for the facilities."[39]

We will deny Phillips' request. As we stated in Mid Louisiana Gas Co., et al.,

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[39]Phillips' protest, at p. 7.

> [A] pipeline might seek to spin off facilities that have a market value higher than their book value, while retaining and seeking to recover stranded investment costs for gathering facilities with a market value lower than their book value. Pipelines should be aware that if they seek to recover stranded investment costs for gathering facilities, the Commission will consider all the pipeline's gathering transactions, including the transfer of assets to an affiliate, when assessing the recoverability of such stranded costs.[40]

2. Budget-Type Certificate Issue

Finally, we note that Gathering Company has stated that some of the facilities may have been reported in AER's year-end budgetary certificate reports. Because many of the facilities are certificated, AER must file an application under NGA section 7(b) to abandon those facilities. We will condition the abandonment authorization on AER's demonstrating that there is in place a regime of private contracts that were negotiated by Gathering Company with AER's existing customers.

The Commission orders:

(A) Upon their acquisition by Gathering Company, the subject facilities will be exempt from Commission

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[40]65 FERC 61,166, at 61,643 (1993).

jurisdiction under section 1(b) of the NGA.

(B) The finding in Ordering Paragraph (A) is conditioned on Gathering Company's demonstrating that there is in place a regime of private contracts with AER's existing customers, in accordance with the discussion in the body of this order.

(C) The finding in Ordering Paragraph (A) is conditioned on AER's filing an application to abandon any facilities that may have been built under its budget-type certificate, as discussed above. The abandonment authorization will be conditioned on AER's demonstrating that there is in place a regime of private contracts that were negotiated by Gathering Company with AER's existing customers, and on AER's filing tariff provisions containing the standards of conduct, as discussed in the body of this order.

(D) The requests for hearing are denied.

(E) The late motions to intervene are granted.

(F) Gathering Company's motion for leave to file an answer to the protests is granted.

(G) Arkansas Royalty's motion to supplement petition for declaratory order is denied.

(H) All tendered pleadings, as discussed above, are accepted into the record.

(I) Indicated Shippers' request to join additional parties to this proceeding is denied.

APPENDIX:

Appendix A

Oklahoma

1. Amber Area - The Amber Area consists of: ten 4-inch pipelines, ranging in length from approximately 36 feet to 3.4 miles; and one 6-inch pipeline, approximately 2 miles long. The pipelines connect to 16 wells and operate near 800 psig. The gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

2. Ames Area - The Ames Area consists of: four 2-inch pipelines, ranging in length from approximately 123 feet to one mile; one 3-inch pipeline, approximately 0.8 miles long; and three 4-inch pipelines, approximately 0.5 to 1.6 miles long. The pipelines connect to three wells and operate at 350 psig. The gas is dehydrated before delivery into one custody transfer point on AER's transmission system.

3. Apache Area - The Apache Area consists of: three 4-inch pipelines, two approximately 1.5 miles long and one approximately 4.1 miles long; and one 8-inch pipeline approximately 4.6 miles long. The pipelines connect to six wells and operate at 700-900 psig. The gas is dehydrated prior to delivery to three custody transfer

points on AER's transmission system.

4. Ashland Area - The Ashland Area consists of: five 2-inch pipelines, ranging in length from approximately 120 feet to one mile; three 3-inch pipelines, approximately 193 feet to 0.8 miles long; and 17 4-inch pipelines, approximately 382 feet to 1.9 miles long. The pipelines connect to 29 wells and operate near 750 psig. The gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

5. Binger Area - The Binger Area consists of: twelve 4-inch pipelines, ranging in length from approximately 93 feet to 2.4 miles; and one 6-inch pipeline, approximately 4.8 miles long. The pipelines connect to nine wells and operate at 800-850 psig. The gas is dehydrated downstream of five custody transfer points on AER's transmission system.

6. Bloomington Area - The Bloomington Area consists of one 4-inch pipeline approximately two miles long. The pipeline connects to one well and operates near 350 psig. The producers dehydrate the gas at the wellhead and it is delivered to a custody transfer point on AER's transmission system.

7. Bokoshe Area - The Bokoshe Area consists of: four 3-inch pipelines, ranging in length from approximately 0.3 to 0.9 miles; twelve 4-inch pipelines, approximately 0.7 to 1.6 miles long; and two compressors totaling 470 horsepower. The pipelines connect to 15 wells and operate at 250-400 psig. The gas is dehydrated

and compressed upstream of delivery to a custody transfer point on AER's transmission system.

8. Bradley Area - The Bradley Area consists of: five 4-inch pipelines, ranging in length from approximately 346 feet to 0.8 miles; and two 8-inch pipelines, one 3.3 miles and one 4.6 miles long. The pipelines connect to seven wells and operate near 100 psig. The gas is dehydrated upstream of two custody transfer points on AER's transmission system.

9. Braman Area - The Braman Area consists of one 439-foot, 2-inch pipeline that connects to two wells, and a 42 horsepower compressor. The Braman Area is currently inactive. When producing it delivers gas into AER's transmission system after it is dehydrated and compressed.

10. Butler Area - The Butler Area consists of: one 3-inch pipeline, approximately 0.3 miles long; and five 4-inch pipelines, ranging in length from approximately 0.7 to 2.3 miles. The pipelines connect to six wells and operate at 800-900 psig. The gas is dehydrated upstream of delivery to two custody transfer points on AER's transmission system.

11. Canute Area - The Canute Area consists of: one 3-inch pipeline, approximately 0.8 miles long; and one 4-inch pipeline, approximately 0.4 miles long. The pipelines connect to three wells and operate at 700 psig. This is a dry gas system that delivers gas to a custody transfer point on AER's transmission system.

12. Carlton Area - The Carlton Area consists of: seven 2-inch pipelines, ranging in length from approximately 28 feet to 0.8 miles; six 3-inch pipelines, approximately 560 feet to three miles long; and 17 4-inch pipelines, approximately 0.2 to 3.4 miles long. The pipelines connect to 30 wells and operate at approximately 350 psig. The gas is dehydrated upstream before delivery into 13 custody transfer points on AER's transmission system.

13. Carpenter Area - The Carpenter Area consists of: two 3-inch pipelines, ranging in length from approximately 0.7 and 1.6 miles; nine 4-inch pipelines, approximately 117 feet to 3 miles long; and one 6-inch pipeline, approximately 1.2 miles long. The pipelines connect to seven wells and operate near 700 psig. The gas is dehydrated prior to delivery to six custody transfer points on AER's transmission system.

14. Carter Area - The Carter Area consists of: six 4-inch pipelines, ranging in length from approximately 25 feet to one mile; and one 6-inch pipeline, approximately 4.9 miles long. The pipelines connect to six wells and operate at 700 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

15. Centrahoma Area - The Centrahoma Area consists of: seven 2-inch pipelines, ranging in length from approximately 19 feet to 0.5 miles; three 3-inch pipelines, approximately 467 feet to 0.6 miles long; eleven 4-inch pipelines, approximately 569 feet to 1.2 miles long; and

three 6-inch pipelines, approximately 0.4 to 1.3 miles long. The pipelines connect to 35 wells and operate near 700 psig. The gas is dehydrated upstream of three custody transfer points on AER's transmission system.

16. Chickasha Area - The Chickasha Area consists of: one 2-inch pipeline, 636 feet long; one 2.5-inch pipeline, approximately 0.2 miles long; eight 3-inch pipelines, ranging in length from approximately 174 feet to 1.5 miles; 34 4-inch pipelines, approximately 58 feet to 1.5 miles long; seven 6-inch pipelines, approximately 0.3 to 1.5 miles long; two 8-inch pipelines, approximately 0.2 and 0.3 miles long; and two 10-inch pipelines, approximately 1.2 and 3.1 miles long. The pipelines connect to 55 wells and operate at 300-950 psig. The gas is dehydrated upstream of delivery to 24 custody transfer points on AER's transmission system.

17. Chitwood Area - The Chitwood Area consists of: three 4-inch pipelines, one 210 feet, one 164 feet, and one 0.8 miles long; and one 6-inch pipeline, approximately 1.5 miles long. The pipelines connect to two wells and operate at 700 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

18. Custer Area - The Custer Area consists of: seven 2-inch pipelines, ranging in length from approximately 189 feet to three miles; three 3-inch pipelines, approximately 0.7 to 1.2 miles long; and 25 4-inch pipelines, approximately 39 feet to 5.2 miles long. The pipelines connect to 31 wells and operate near 350

psig. The gas is dehydrated prior to delivery to eight custody transfer points on AER's transmission system. Gas on a few lines is dehydrated by the producers prior to receipt by Gathering Company.

19. Deer Creek Area - The Deer Creek Area consists of: five 4-inch pipelines, ranging in length from approximately 179 feet to 1.1 miles; and one 8-inch pipeline, approximately ten miles long. The pipelines connect to two wells and operate generally at less than 100 psig. The gas is either dehydrated prior to delivery to AER's transmission system or delivered to Western Gas Resources for processing prior to delivery to AER's transmission system.

20. Eagle City Area - The Eagle City Area consists of five 4-inch pipelines, approximately 912 feet to 3.3 miles long. The pipelines connect to five wells and operate at approximately 350 psig. The gas is dehydrated upstream of delivery to three custody transfer points on AER's transmission system.

21. Enid Area - The Enid Area consists of: seven 2-inch pipelines, ranging in length from approximately 212 feet to 0.7 miles; 19 3-inch pipelines, approximately four feet to 2.7 miles long; ten 4-inch pipelines, approximately 566 feet to 1.1 miles long; one 8-inch pipeline, approximately 5.1 miles long; and one 90 horsepower compressor. The pipelines connect to 20 wells. Most of the lines are currently inactive. However, when active, they operate at approximately 300-350 psig. The gas is dehydrated prior to delivery to AER's transmission system

at five custody transfer points.

22. Erick Area - The Erick Area consists of: one 2-inch pipeline, 902 feet long; six 4-inch pipelines, ranging in length from approximately 0.3 to 0.8 miles; and one 6-inch pipeline, approximately 1.6 miles long. The pipelines connect to six wells and operate at approximately 300 psig. This is primarily a dry gas system with producers providing dehydration at the wellhead. The gas is delivered to two custody transfer points on AER's transmission system. Most of the lines are currently inactive.

23. Geary Area - The Geary Area consists of: three 4-inch pipelines, two approximately 0.6 miles long and one approximately 8.5 miles long. The pipelines attach to three wells and operate at 400 psig. The gas is dehydrated and delivered to a custody transfer point on AER's transmission system.

24. Gerty Area - The Gerty Area consists of: one 2-inch pipeline, 164 feet long; one 3-inch pipeline, approximately 0.4 miles long; and ten 4-inch pipelines, ranging in length from approximately 464 feet to 3.4 miles. The pipelines connect to 13 wells and operate near 800 psig. The gas is dehydrated prior to delivery to six custody transfer points on AER's transmission system.

25. Gotebo Area - The Gotebo Area consists of: one 4-inch pipeline, approximately 1.6 miles long; and one 6-inch pipeline, approximately 1.3 miles long. The pipelines connect to one well. When producing, it

delivers gas to Natural Gas Pipeline of America's transmission system.

26. Hinton Area - The Hinton Area consist of: one 3-inch pipeline, approximately 0.2 miles long; 14 4-inch pipelines, ranging in length from approximately 118 feet to 2.4 miles; and two 6-inch pipelines, one 465 feet long and one 10.3 miles long. The pipelines connect to 19 wells and operate near 900 psig. The gas is dehydrated upstream of two custody transfer points on AER's transmission system.

27. Holdenville Area - The Holdenville Area consists of: one 3-inch pipeline, approximately 0.5 miles long; and one 4-inch pipeline, approximately 0.6 miles long. The area is currently inactive. When it is producing, the gas is delivered dehydrated to two custody transfer points on AER's transmission system.

28. Indianapolis Area - The Indianapolis Area consists of two 4-inch pipelines, approximately 957 feet and 0.2 miles long. The pipelines connect to two wells and operate at approximately 900 psig. The gas is dehydrated upstream of delivery to two custody transfer points on AER's transmission system.

29. Jesse Area - The Jesse Area consists of three 2-inch pipelines that total approximately 1.2 miles. The pipelines attach to one well and operate at 50 psig. The gas is delivered at two custody transfer points to Koch Oil Plant.

30. Kinta Area - The Kinta Area consists of: nine 2-inch pipelines, ranging in length from approximately eight feet to 0.7 miles; 37 3-inch pipelines, approximately 254 feet to 3.6 miles long; 53 4-inch pipelines, approximately 47 feet to 2.1 miles long; four 6-inch pipelines, approximately one mile to 3.3 miles long; one 8-inch pipeline, approximately 8.1 miles long; and one 700 horsepower compressor. The pipelines connect to 163 wells and operate at 400-800 psig. The gas is compressed and dehydrated prior to delivery to four custody transfer points on AER's transmission system.

31. Kiowa Area - The Kiowa Area consists of: three 2-inch pipelines, ranging in length from approximately ten feet to 0.9 miles; 38 4-inch pipelines, approximately 130 feet to 1.7 miles long; 14 6-inch pipelines, approximately 169 feet to 3.4 miles long; and two 8-inch pipelines, one 3.4 miles and one 5.7 miles long. The pipelines connect to 85 wells and operate at 600-800 psig. The gas is dehydrated immediately upstream of a custody transfer point on AER's transmission system.

32. Lacy Area - The Lacy Area consists of: twelve 2-inch pipelines, ranging in length from approximately 315 feet to 1.4 miles; 15 3-inch pipelines, approximately 65 feet to 1.6 miles long; 25 4-inch pipelines, approximately 161feet to 2.9 miles long; four 6-inch pipelines, approximately 1.3 to 7.9 miles long; and one 530 horsepower compressor. The pipelines connect to 36 wells and operate at approximately 350 psig. The gas is dehydrated prior to delivery into AER's transmission system at six custody transfer points.

33. Leedy Area - The Leedy Area consists of: 31 4-inch pipelines, ranging in length from approximately 613 feet to 1.8 miles; one 6-inch pipeline, approximately 1.2 miles long; and one 10-inch pipeline, approximately 6.4 miles long. The pipelines connect to 40 wells and operate mostly at 350-400 psig. A few isolated lines operate at 900 psig. The gas is dehydrated upstream of delivery to AER's Leedy Compressor Station on its transmission system.

34. Marlow Area - The Marlow Area consists of: eight 2-inch pipelines, ranging in length from approximately one foot to 0.7 miles; eight 3-inch pipelines, approximately 330 feet to one mile long; 21 4-inch pipelines, approximately 67 feet to 3 miles long; six 6-inch pipelines, approximately 0.4 to 6 miles long; and one 8-inch pipeline, approximately 0.6 miles long. The pipelines connect to 38 wells and operate at 250-350 psig. The gas is dehydrated upstream of delivery to eleven custody transfer points on AER's transmission system.

35. Mayfield Area - The Mayfield Area consists of: two 4-inch pipelines, each approximately 0.5 miles long; and one 6-inch pipeline, approximately 5.1 miles long. The pipelines attach to three wells and operate near 950 psig. The gas is dehydrated at the wellhead by the producers and delivered to a custody transfer point on AER's transmission system.

36. Mayflower Area - The Mayflower Area consists of: one 4-inch pipeline, approximately 2.6 miles long; and one 8-inch pipeline, approximately 4.8 miles

long. The pipelines connect to two wells. The area is currently inactive. When producing, it delivers dehydrated gas to a custody transfer point on AER's transmission system.

37. McAlester Area - The McAlester Area consists of: one 2-inch pipeline, 142 feet long; one 3-inch pipeline, approximately 4.7 miles long; eleven 4-inch pipelines, ranging in length from approximately 107 feet to 1.2 miles; one 6-inch pipeline, approximately 0.4 miles long; and two 8-inch pipelines, approximately 0.7 and 3.1 miles long. The pipelines connect to 22 wells and operate at 600-700 psig. The gas is dehydrated upstream of two custody transfer points on AER's transmission system.

38. Midway Area - The Midway Area consists of: one 3-inch pipeline, 142 feet long; seven 4-inch pipelines, ranging in length from approximately 75 feet to 1.5 miles; and one 6-inch pipeline, approximately 1.3 miles long. The pipelines connect to ten wells and operate at approximately 900 psig. The gas is dehydrated upstream of delivery to two custody transfer points on AER's transmission system. One of the 4-inch lines delivers gas to a custody transfer point on El Paso Natural Gas Company's transmission system.

39. Minco Area - The Minco Area consists of: one 2-inch pipeline, approximately 0.3 miles long; two 3-inch pipelines, one 200 feet and one 0.2 miles long; 18 4-inch pipelines, ranging in length from approximately 21 feet to 3.6 miles; one 8-inch pipeline, approximately 4.9 miles long; and two 10-inch pipelines, one 1.6 miles and one 2.6

miles long. The pipelines connect to 19 wells and operate at 800-850 psig. The gas is dehydrated prior to delivery to five custody transfer points on AER's transmission system.

40. Oakman Area - The Oakman Area consists of: one 2-inch pipeline, 419 feet long; and two 4-inch pipelines, one 550 feet long and one 0.6 miles long. The pipelines connect to three wells and operate at 700-900 psig. The gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

41. Panola Area - The Panola Area consists of: one 3-inch pipeline, approximately 0.4 miles long; and 14 4-inch pipelines, ranging in length from approximately 154 feet to one mile. The pipelines connect to 18 wells and operate at 900-950 psig. The gas is dehydrated upstream of delivery to three custody transfer points on AER's transmission system.

42. Paw Paw Area - The Paw Paw Area consists of: 15 2-inch pipelines, ranging in length from approximately ten feet to 0.8 miles; 43 3-inch pipelines, approximately eight feet to 2.1 miles long; 50 4-inch pipelines, approximately 195 feet to 7.4 miles long; four 6-inch pipelines, approximately 1.1 to 4.5 miles long; two compressors totaling 340 horsepower; and three other compressors that operate at 80, 65, and 170 horsepower. The pipelines connect to 171 wells and operate at 400-600 psig. The gas is compressed and dehydrated prior to delivery to four custody transfer points on AER's transmission system.

43. Peek Area - The Peek Area consists of one 4-inch pipeline, approximately 1.7 miles long. It connects to one well and delivers gas to a custody transfer point on Panhandle Eastern Pipe Line Company's transmission system. This area is currently inactive.

44. Pine Hollow Area - The Pine Hollow Area consists of: 23 2-inch pipelines, ranging in length from approximately 40 feet to 1.1 miles; one 2.5-inch pipeline, 478 feet long; 15 3-inch pipelines, approximately 494 feet to 1.8 miles long; nine 4-inch pipelines, approximately 158 to 3.4 miles long; one 8-inch pipeline, approximately 12 miles long; five compressors that operate at a total of 2,400 horsepower; and the Watkins compressor that operates at 35 horsepower. The pipelines connect to 53 wells and operate at 200-500 psig depending upon the distance away from the Pine Hollow compressors. The gas is dehydrated and compressed immediately upstream of a custody transfer point on AER's transmission system.

45. Quinton Area - The Quinton Area consists of: five 3-inch pipelines, ranging in length from approximately 74 feet to 0.8 miles; 34 4-inch pipelines, approximately 330 feet to 2.6 miles long; twelve 6-inch pipelines, approximately 0.7 to 2.4 miles long; and three 8-inch pipelines, approximately 1.9 to 6 miles long. The pipelines connect to 88 wells and operate at 400-500 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

46. Russelville Area - The Russelville Area consists of: 35 4-inch pipelines, ranging in size from

approximately 30 feet to 6 miles; 13 6-inch pipelines, approximately 611 feet to 6.9 miles long; and three 10-inch pipelines, approximately 0.5 to 7.3 miles long. The pipelines attach to 80 wells and operate at 300-400 psig. The gas is dehydrated prior to delivery to three custody transfer points on AER's transmission system.

47. Reams Area - The Reams Area consists of: ten 2-inch pipelines, ranging in length from approximately 101 feet to 0.4 miles; 16 3-inch pipelines, approximately 18 feet to 1.3 miles long; 14 4-inch pipelines, approximately 514 feet to 2.9 miles long; one 6-inch pipeline, approximately 10.9 miles long; one 8-inch pipeline, approximately 1.3 miles long; one 10-inch pipeline, approximately 5 miles long; and two field compressors that operate at a total of 560 horsepower. The pipelines connect to 58 wells. The lines operate at 50-70 psig upstream of the Reams compressor, while other lines in the area may operate at up to 500 psig. The Reams compressor discharges into a custody transfer point on AER's transmission system. Various field lines and other pipelines also deliver gas into other custody transfer points on AER's transmission system.

48. Red Oak Area - The Red Oak Area consists of: three 2-inch pipelines, ranging in length from approximately 146 feet to 1 mile; 29 3-inch pipelines, approximately 22 feet to 1.1 miles long; 77 4-inch pipelines, approximately 143 feet to 4.8 miles long; 13 6-inch pipelines, approximately 0.6 to 2.6 miles long; one 8-inch pipeline, approximately 2.3 miles long; and seven compressors that operate at a total of 2,830 horsepower.

The pipelines connect to 158 wells and operate from 300-950 psig. The gas is dehydrated and delivered to nine custody transfer points on AER's transmission system.

49. Shattuck Area - The Shattuck Area consists of: one 2-inch pipeline, 733 feet long; and five 4-inch pipelines, ranging in length from approximately 203 feet to 8.7 miles. The pipelines connect to 17 wells and operate at 280-300 psig. The gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

50. Sickles Area - The Sickles Area consists of: nine 4-inch pipelines, ranging in length from approximately 292 feet to 1.3 miles; and two 6-inch pipelines, one 1.4 miles and one 3.1 miles long. The pipelines connect to twelve wells and operate near 900 psig. The gas is dehydrated prior to delivery to three custody transfer points on AER's transmission system.

51. Sooner Trend Area - The Sooner Trend Area consists of: six 2-inch pipelines, ranging in length from approximately 14 feet to 0.3 miles; 34 3-inch pipelines, approximately eight feet to 2 miles long; 23 4-inch pipelines, approximately 165 feet to 3.5 miles long; and three 6-inch pipelines, approximately 0.5 to 2.8 miles long. The pipelines connect to 60 wells. Part of the system operates at approximately 350 psig with a central point of dehydration at one custody transfer point with AER's transmission system. There are six other custody transfer points, one that delivers gas to Mustang Fuel.

52. Spiro Area - The Spiro Area consists of: 23 2-inch pipelines, ranging in length from approximately ten feet to 1.2 miles; 41 3-inch pipelines, approximately 150 feet to 1.6 miles long; 99 4-inch pipelines, approximately 27 feet to 3 miles long; ten 6-inch pipelines, approximately 0.5 to 7 miles long; four 8-inch pipelines, approximately 1.7 to 11.9 miles long; and three compressors, one 220 horsepower and two 42 horsepower. The pipelines connect to 212 wells and operate at 400-600 psig. The gas is dehydrated prior to delivery at AER's Spiro Compressor facility.

53. Stigler Area - The Stigler Area consists of: one 3-inch pipeline, approximately 0.4 miles long; and three 4-inch pipelines, ranging in length from approximately 0.4 to 2.6 miles. The pipelines connect to one well and operate at 400-600 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

54. Strong City Area - The Strong City Area consists of: three 4-inch pipelines, ranging in length from approximately 172 feet to 0.7 miles. The pipelines connect to five wells and operate near 900 psig. The gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

55. Wardville Area - The Wardville Area consists of four 4-inch pipelines, approximately 0.6 to 4.5 miles long. The pipelines connect to four wells and operate near 800 psig. The gas is dehydrated upstream of a custody transfer point on AER's transmission system.

56. Weatherford Area - The Weatherford Area consists of: one 3-inch pipeline, approximately 0.9 miles long; 19 4-inch pipelines, approximately 46 feet to 1.5 miles long; one 6-inch pipeline, approximately 3.3 miles long; and one 8-inch pipeline, approximately 3.7 miles long. The pipelines connect to 21 wells and operate at 900-950 psig, with a few lines operating at 400-450 psig. The gas is dehydrated upstream of delivery to three custody transfer points on AER's transmission system and one point on Delhi Gas Pipeline's system.

57. Wilburton Area - The Wilburton Area consists of: six 2-inch pipelines, ranging in length from approximately 58 feet to 0.9 miles; 27 3-inch pipelines, approximately 40 feet to 1.3 miles long; 129 4-inch pipelines, approximately 16 feet to 3.2 miles long; seven 6-inch pipelines, approximately 0.6 to 1.9 miles long; three 8-inch pipelines, approximately 3 to 4 miles long; and one 10-inch pipeline, approximately 3.3 miles long. The pipelines connect to 236 wells and operate at 500-700 psig. The gas is dehydrated prior to delivery to several custody transfer points on AER's transmission system or to AER's Wilburton station.

58. Wirth Area - The Wirth Area consists of: one 2-inch pipeline, approximately 0.5 miles long; nine 4-inch pipelines, ranging in length from approximately 50 feet to 0.7 miles; and one 8-inch pipeline, approximately 10 miles long. The pipelines connect to 13 wells and operate at 400-450 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

Oklahoma - Arkansas Border

59. Bonanza Area - The Bonanza Area consist of: 14 2-inch pipelines, ranging in length from approximately seven feet to one mile; 15 3-inch pipelines, approximately 36 feet to 1.4 miles long; 50 4-inch pipelines, approximately 142 feet to 3.1 miles long; four 6-inch pipelines, approximately one to 9.6 miles long; and four compressors that operate at a total of 1,570 horsepower. The pipelines connect to 128 wells and operate at 250-500 psig. The gas is dehydrated and compressed prior to delivery to four custody transfer points on AER's transmission system.

Arkansas

60. Aetna Area - The Aetna Area consists of: two 2-inch pipelines, 38 and 765 feet long; two 3-inch pipelines, approximately 0.7 to 0.9 miles long; 33 4-inch pipelines, ranging in length from approximately twelve feet to 4.5 miles; and four 6-inch pipelines, approximately 43 feet to 4 miles long. The pipelines connect to 71 wells and operate at 300-500 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

61. BM-15 Area - The BM-15 area consists of: one 2-inch pipeline, 355 feet long; one 3-inch pipeline, 330 feet long; twelve 4-inch pipelines, ranging in length from approximately 35 feet to 2 miles; and one 6-inch pipeline, approximately 0.9 miles long. The pipelines connect to 26 wells and operate at 300-600 psig. The gas is

dehydrated prior to delivery to five custody transfer points on AER's transmission system.

62. Cecil Area - The Cecil Area consists of: 18 2-inch pipelines, ranging in length from approximately 106 feet to 1.9 miles; 39 3-inch pipelines, approximately 99 feet to 2.7 miles long; 59 4-inch pipelines, approximately 37 feet to 2.4 miles long; six 6-inch pipelines, approximately 0.6 to 3 miles long, one 8-inch pipeline, approximately 10.2 miles long; and five compressors, that operate between 30 and 615 horsepower. The pipelines connect to 187 wells and operate at 250-300 psig, with some lines as high as 500 psig. The gas is dehydrated and compressed prior to delivery to three custody transfer points on AER's transmission system at Walker Station.

63. Chismville Area - The Chismville Area consists of: three 2-inch pipelines, ranging in length from approximately 206 feet to 1.1 miles; five 3-inch pipelines, approximately 261 feet to 0.7 miles long; 35 4-inch pipelines, approximately 114 feet to 2.4 miles long; and nine 6-inch pipelines, approximately 592 to 7.1 miles long. The pipelines connect to 82 wells and operate at 600-800 psig. The gas is dehydrated prior to delivery to 16 custody transfer points on AER's transmission system.

64. Clarksville Area - The Clarksville Area consists of: 21 2-inch pipelines, ranging in length from approximately 194 feet to 1.4 miles; 40 3-inch pipelines, approximately 456 feet to 2.1 miles long; 35 4-inch pipelines, approximately 44 feet to 2.6 miles long; and two 6-inch pipelines, approximately 0.7 to 3.7 miles long. The

pipelines connect to 127 wells and operate at 300-500 psig. The gas is dehydrated and compressed prior to delivery to six custody transfer points on AER's transmission system.

65. Ft. Chaffee Area - The Ft. Chaffee Area consists of: eight 3-inch pipelines, ranging in length from approximately 256 feet to one mile; 16 4-inch pipelines, approximately 34 feet to 3.8 miles long; one 6-inch pipeline, approximately 5.3 miles long, and two compressors that operate at 700 and 220 horsepower. The pipelines connect to 41 wells and operate at 70-150 psig. The gas is dehydrated, compressed and discharged at the Ft. Chaffee compressor facilities into AER's transmission system.

66. Gragg Area - The Gragg Area consists of: eleven 2-inch pipelines, ranging in length from approximately seven feet to 0.6 miles; nine 3-inch pipelines, approximately 0.2 to 1.4 miles long; 40 4-inch pipelines, approximately 124 feet to 2.1 miles long; one 6-inch pipeline, approximately 3.8 miles long; and five compressors that operate between 42 and 530 horsepower. The pipelines connect to 96 wells and operate at 80-120 psig. The gas is dehydrated and compressed prior to delivery at the Sanderson, Mansfield, and Gragg compressor interconnects or ten other custody transfer points on AER's transmission system.

67. Jerusalem Area - The Jerusalem Area consists of: one 3-inch pipeline, approximately one mile long; and six 4-inch pipelines, ranging in length from approximately 330 feet to 1.2 miles. The pipelines connect to four wells

and are currently idle. When the area is active the gas is delivered to four custody transfer points on AER's transmission system.

68. Kibler Area - The Kibler Area consists of: 13 2-inch pipelines, ranging in length from approximately 13 feet to 1.4 miles; 68 3-inch pipelines, approximately 220 feet to 2 miles long; 37 4-inch pipelines, approximately 266 feet to 3.2 miles long; four 6-inch pipelines, approximately one to 7.9 miles long; one 10-inch pipeline, approximately 0.8 miles long; and two 220 horsepower compressors. The pipelines connect to 225 wells and operate at 120-500 psig. The gas is compressed and dehydrated prior to delivery to four custody transfer points on AER's transmission system.

69. Knoxville Area - The Knoxville Area consists of: seven 2-inch pipelines, approximately 184 feet to 1.3 miles long; 29 3-inch pipelines, approximately 110 feet to 1.7 miles long; 66 4-inch pipelines, approximately 41 feet to 5.3 miles long; five 6-inch pipelines, approximately 0.6 to 8.2 miles long; two 8-inch pipelines, approximately 0.9 to 9.1 miles long; one 10-inch pipeline, approximately 5.5 miles long; and one 150 horsepower and two 140 horsepower compressors. The pipelines attach to 143 wells and operate at 300-500 psig. The gas is compressed and dehydrated prior to delivery to three custody transfer points on AER's transmission system.

70. Line J Area - The Line J Area consists of: one 3-inch pipeline, approximately 0.6 miles long, and 32 4-inch pipelines, ranging in length from approximately 84

feet to 3.2 miles. The pipelines connect to 52 wells. Some of the pipelines operate at 250-500 psig, while others exceed 800 psig. The gas is dehydrated prior to delivery to nine custody transfer points on AER's transmission system.

71. Missionary Lake Area - The Missionary Lake Area consists of: one 2-inch pipeline, 994 feet long; one 2.5-inch pipeline, approximately 1.8 miles long; and one 4-inch pipeline, approximately 0.3 miles long. The pipelines connect to two wells and operate at 100-200 psig. The gas is dehydrated prior to delivery to two custody receipt points on AER's transmission system.

72. Ozark Area - The Ozark Area consists of: eight 2-inch pipelines, ranging in length from approximately 31 feet to 0.4 miles; ten 3-inch pipelines, approximately 84 feet to 1.2 miles long; 28 4-inch pipelines, approximately 136 feet to 2.3 miles long; one 6-inch pipeline, approximately 4.5 miles long; and one 8-inch pipeline, approximately 4.8 miles long. The pipelines connect to 80 wells and operate at 400-600 psig. The gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

73. Slaytonville Area - The Slaytonville Area consists of: four 3-inch pipelines, ranging in length from approximately 201 feet to 1.3 miles; and seven 4-inch pipelines, approximately 0.5 to 1.5 miles long. The pipelines connect to 10 wells and operate at 300-500 psig. The gas is dehydrated prior to delivery to two custody delivery points on AER's transmission system.

74. Spardra Area - The Spardra Area consists of: five 2-inch pipelines, ranging in length from approximately 146 feet to 1 mile; 15 3-inch pipelines, approximately 460 feet to 2.6 miles long; 29 4-inch pipelines, approximately 49 feet to 4.5 miles long; and one 6-inch pipeline, approximately 0.3 miles long. The pipelines connect to 76 wells and operate at 300-500 psig, with a few operating at over 800 psig. The gas is dehydrated prior to delivery to five custody transfer points on AER's transmission system.

75. Union City Area - The Union City Area consists of: four 2-inch pipelines, ranging in length from approximately 139 feet to 1.8 miles; 21 3-inch pipelines, approximately 269 feet to 1.7 miles long; 19 4-inch pipelines, approximately 459 feet to 3.4 miles long; and one 60 horsepower compressor. The pipelines connect to 63 wells and operate at 300-550 psig. The gas is compressed and dehydrated prior to delivery to six custody transfer points on AER's transmission system.

76. Witcherville Area - The Witcherville Area consists of: one 2-inch pipeline, approximately 0.7 miles long; five 3-inch pipelines, ranging in length from approximately 40 feet to 0.8 miles; 19 4-inch pipelines, approximately 0.4 to 3.5 miles long; one 6-inch pipeline, approximately 1.7 miles long; and one 700 horsepower compressor. The pipelines connect to 35 wells and operate at 90-200 psig. The gas is compressed and dehydrated prior to delivery to four custody transfer points on AER's transmission system.

Texas-Oklahoma Border

77. Quitman Area - The Quitman Area consists of: one 2-inch pipeline, 154 feet long; one 3-inch pipeline, 691 feet long; and three 4-inch pipelines, ranging in length from approximately 517 feet to 1.2 miles. The pipelines connect to three wells and operate at 500 psig. The gas is dehydrated prior to delivery to four custody transfer points on AER's transmission system.

Texas

78. Beckville Area - The Beckville Area consists of: 18 4-inch pipelines, ranging in length from approximately 715 feet to 1.4 miles; four 6-inch pipelines, approximately 1.3 to 9.1 miles long; and one 8-inch pipeline, approximately 3.8 miles long. The pipelines connect to 27 wells and operate at 200-300 psig. The gas is delivered into the Hawk Gathering System owned by R. Lacy Inc.

79. Britt Ranch Area - The Britt Ranch Area consists of: one 3-inch pipeline, 998 feet long; four 4-inch pipelines, ranging in length from approximately 404 feet to 4.4 miles; one 6-inch pipeline, 2.7 miles long; and one 8-inch pipeline, 5.4 miles long. The pipelines connect to eight wells and operate at 800-1000 psig. The gas is dehydrated prior to delivery to three custody transfer points on AER's transmission system.

80. Buffalo Wallow Area - The Buffalo Wallow Area consists of: one 3-inch pipeline, approximately 0.6 miles long; six 4-inch pipelines, ranging in length from approximately 200 feet to one mile; and one 6-inch

pipeline, approximately 0.4 miles long. The pipelines connect to seven wells and operate at 800-1,000 psig. The gas is dehydrated and delivered to five custody points on AER's transmission system.

81. Carthage Area - The Carthage Area includes two sub-areas, one low pressure and one high pressure. The low pressure sub-area consist of: two 2-inch pipelines, approximately 0.8 and 1.3 miles long; one 2.5-inch pipeline, 96 feet long; nine 3-inch pipelines, ranging in length from approximately 0.2 to 1.6 miles; 17 4-inch pipelines, approximately 57 feet to 2.5 miles long; one 6-inch pipeline, approximately 2.8 miles long; one 8-inch pipeline, approximately 2.1 miles long; one 10-inch pipeline, approximately 4.4 miles long, and one 350 horsepower compressor. The pipelines connect to 35 wells and operate at 35 psig. The gas is dehydrated at a central point and delivered to Union Pacific Resources Co. (Union).

The high pressure area consists of: one 3-inch pipeline, 175 feet long; 19 4-inch pipelines, ranging in length from approximately 100 feet to 2 miles long; and three 6-inch pipelines, approximately 0.4 to 4.8 miles long. The pipelines connect to 30 wells and operate at 400-500 psig. The gas is dehydrated prior to delivery to Union or to AER's transmission system.

82. Cedar Springs Area - The Cedar Springs Area consists of three 4-inch pipelines, ranging in length from approximately 652 feet to 0.6 miles. The pipelines connect to three wells and operate at 650-850 psig. The

gas is dehydrated prior to delivery to two custody transfer points on AER's transmission system.

83. Hemphill Area - The Hemphill Area includes the Hemphill and Hamon-Locke sub-areas. The Hemphill sub-area consists of: five 3-inch pipelines, ranging in length from approximately 437 feet to 0.5 miles; 31 4-inch pipelines, approximately 56 feet to 3.8 miles long; three 6-inch pipelines, approximately 0.6 to 1.1 miles long; one 8-inch pipeline, approximately 2.3 miles long, one 10-inch pipeline, approximately 0.7 miles long; and four compressors totaling 922 horsepower. The pipelines connect to 36 wells and operate at 300-400 psig. The gas is compressed and dehydrated prior to delivery into a custody transfer point on AER's transmission system.

The Hamon-Locke sub-area consists of: one 2-inch pipeline, 585 feet long; one 3-inch pipeline, 645 feet long; four 4-inch pipelines, ranging in length from approximately 745 feet to one mile; and one 65 horsepower compressor. The pipelines connect to five wells and operate at approximately 200 psig. The gas is dehydrated and compressed upstream of the delivery into a custody transfer point on AER's transmission system. This area is currently inactive.

84. Indian Rock Area - The Indian Rock Area consists of: twelve 4-inch pipelines, ranging in length from approximately 164 feet to 3.2 miles; two 6-inch pipelines, approximately 3.9 to 7.9 miles long; one 8-inch pipeline, approximately 13.6 miles long; and the Gilmer Sweeting Plant hydrogen-sulfide treating facility. The pipelines

connect to 18 wells and operate at 800-990 psig. The gas is dehydrated and treated at the Gilmer plant and delivered to Arkla Chemical Company's Willow Springs Processing Plant.

85. Jefferson Area - The Jefferson Area consists of: five 2-inch pipelines, ranging in length from approximately 65 feet to 0.5 miles; three 3-inch pipelines, approximately 0.4 to 0.7 miles long; 16 4-inch pipelines, approximately 75 feet to 3.4 miles long; three 6-inch pipelines, approximately 0.8 to 2.8 miles long; two 8-inch pipelines, approximately 0.9 to 2.8 miles long; and one 350 horsepower compressor. The pipelines connect to 23 wells and operate at less than 50 psig. The gas is compressed and dehydrated prior to delivery at the point where the Jefferson compressor discharges into AER's transmission system at 400 psig.

86. Mathers Ranch Area - The Mathers Ranch Area consists of one 12-inch pipeline, approximately 4.7 miles long, with numerous tap locations for connecting producer owned lines. It operates at 300-400 psig and is currently attached to one well. A majority of the gas gathered in the Mathers Ranch Area is sour gas, which is dehydrated and sweetened upstream of delivery to a custody transfer point on AER's transmission system.

87. Stiles Ranch Area - The Stiles Ranch Area consists of nine 4-inch pipelines, ranging in length from approximately 955 feet to 1.5 miles. The pipelines connect to 11 wells and operate at approximately 950 psig. The gas is dehydrated upstream of delivery to five custody

transfer points on AER's transmission system.

88. Stockman Area - The Stockman Area consists of: one 3-inch pipeline, approximately 0.4 miles long; eleven 4-inch pipelines, ranging in length from approximately 195 feet to 4 miles; one 6-inch pipeline, approximately 1.4 miles long; and one 140 horsepower compressor. The pipelines connect to 19 wells and operate at 600 psig. The gas is dehydrated and compressed to 850 psig prior to delivery at a custody transfer point on Texas Eastern Transmission Company's transmission system.

89. Tatum Area - The Tatum Area consists of: two 3-inch pipelines, ranging in length from approximately 217 feet to 1 mile; 13 4-inch pipelines, approximately 748 feet to 2 miles long; and two 6-inch pipelines, approximately 0.9 and 4.5 miles long. The pipelines connect to 18 wells and operate at 750-900 psig. The gas is delivered to two custody transfer points on AER's transmission system.

90. Waskom Area - The Waskom Area consists of: eleven 2-inch pipelines, ranging in length from approximately 13 feet to 0.8 miles; 14 3-inch pipelines, approximately 210 feet to 26.1 miles long; 49 4-inch pipelines, approximately 109 feet to 3.5 miles long; six 6-inch pipelines, approximately 38 feet to 5.2 miles long; four 8-inch pipelines, approximately 1.1 to 6.8 miles long; and six compressors, four that operate at a total of 3,200 horsepower, one that operates at 140 horsepower, and one that operates at 90 horsepower. The pipelines connect to 100 wells and operate at 200-400 psig. The gas is

delivered to Arkla Chemical Company's Waskom Plant.

91. Whelan Area - The Whelan Area consists of: one 3-inch pipeline, 561 feet long; five 4-inch pipelines, ranging in length from approximately 0.4 to 1.4 miles; and one 100 horsepower compressor. The pipelines connect to five wells. The area is currently inactive. However, when the area is active the gas is dehydrated and delivered to two custody transfer points on AER's transmission system.

Louisiana

92. ADA Area - The ADA Area consists of: two 3-inch pipelines, 325 and 833 feet long; and two 4-inch pipelines, both approximately 0.3 miles long. The pipelines connect to one well and operate at 400 psig. The well is currently inactive. However, when it is active, the gas is delivered to a custody transfer point on AER's transmission system after dehydration.

93. Athens Area - The Athens Area consists of: one 2-inch pipeline, 79 feet long; one 4-inch pipeline, approximately 1.3 miles long; and one 6-inch pipeline, approximately 0.6 miles long. The pipelines connect to three wells and operate at 400 psig. The gas is dehydrated prior to delivery to three custody transfer points on AER's transmission system.

94. Calhoun Area - The Calhoun Area consists of: three 2-inch pipelines, ranging in length from approximately 338 feet to 0.8 miles; 18 4-inch pipelines,

approximately 158 feet to 1.2 miles long; and four 6-inch pipelines, approximately 0.8 to one mile long. The pipelines connect to 34 wells and operate at 50-150 psig. The gas is dehydrated prior to delivery to AER's Calhoun Compressor Station.

95. Caspiana Area - The Caspiana Area consists of: six 2-inch pipelines, ranging in length from approximately 0.3 to 1.2 miles; and four 4-inch pipelines, approximately 0.4 to 0.9 miles long. The pipelines connect eight wells and operate at 400 psig. The gas is delivered wet to AER's transmission system and is dehydrated downstream.

96. Cheniere Area - The Cheniere Area consists of: five 2-inch pipelines, ranging in length from approximately 299 feet to 1.3 miles; four 3-inch pipelines, approximately 0.4 to 0.9 miles long; seven 4-inch pipelines, approximately 133 feet to one mile long; and one 6-inch pipeline, approximately 1.2 miles long. The pipelines connect to 15 wells and operate at 400 psig. The gas is dehydrated prior to delivery to six custody transfer points on AER's transmission system.

97. Greenwood-Waskom Area - The Greenwood-Waskom Area consists of: three 2-inch pipelines, ranging in length from approximately 173 feet to 1.2 miles; four 3-inch pipelines, approximately 819 feet to 1.1 miles long; 19 4-inch pipelines, approximately 817 feet to 1.1 miles long; three 6-inch pipelines, approximately 0.6 to 7.4 miles long; one 8-inch pipeline, approximately 0.4 miles long; one 10-inch pipeline, approximately 3.1 miles long; and

one 60 horsepower compressor. The pipelines connect to 40 wells and operate at 200-300 psig. The gas is delivered to Arkla Chemical Corporation's Waskom Plant.

98. Lillie Area - The Lillie Area consists of one 4-inch pipeline, approximately 0.5 miles long. The line operates at approximately 200-300 psig. However, it is currently inactive. When it is active, the gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

99. Longwood Area - The Longwood Area consists of: three 2-inch pipelines, from 251 feet to 1.1 miles in length; one 2.5-inch pipeline, 0.7 miles long; six 3-inch pipelines, ranging in length from approximately 960 feet to 1.7 miles; six 4-inch pipelines, approximately 0.6 to 3.7 miles long; one 6-inch pipeline, approximately 1.9 miles long; and one 60 horsepower compressor. The pipelines connect to 16 wells and operate at approximately 350 psig. The gas is dehydrated prior to delivery to a custody receipt point on AER's transmission system.

100. Metcalf Area - The Metcalf Area consists of one 4-inch pipeline, approximately 0.2 miles long. The pipeline attaches to one well and operates at 150-200 psig. The gas is dehydrated prior to delivery to a custody transfer point on AER's transmission system.

101. Pine Island Area - The Pine Island Area consists of: one 2-inch pipeline, 73 feet long; and three 4-inch pipelines, ranging in length from approximately 577 feet to 0.7 miles. The pipelines connect to six wells and

operate at 250 psig. The gas is dehydrated prior to delivery to three custody transfer points on AER's transmission system.

102. Plain Dealing Area - The Plain Dealing Area consists of: three 4-inch pipelines, ranging in length from approximately 952 feet to 1.2 miles; and one 6-inch pipeline, 203 feet long. The pipelines connect to five wells and operate at 750-850 psig. The gas is gathered dry and delivered to a custody transfer point on AER's transmission system.

103. Ruston Area - The Ruston Area consists of: 11 2-inch pipelines, ranging in length from approximately 33 feet to 0.9 miles; 11 3-inch pipelines, approximately 440 feet to 3.1 miles long; 47 4-inch pipelines, approximately 55 feet to 2.1 miles long; seven 6-inch pipelines, approximately 419 feet to 4.9 miles long; one 8-inch pipeline, approximately 0.8 miles long; one 10-inch pipeline, approximately 1.3 miles long; and two compressors with a total of 660 horsepower. The pipelines connect to 66 wells and operate at 160-440 psig. The gas is dehydrated and compressed prior to delivery to where the Ruston Area compressor discharges into AER's transmission system.

104. Stonewall Area - The Stonewall Area consists of: three 2-inch pipelines, ranging in length from approximately 250 feet to 0.4 miles; one 2.5-inch pipeline, approximately 0.8 miles long; one 3-inch pipeline, approximately one mile long; eight 4-inch pipelines, approximately 122 feet to 3.6 miles long; and one 6-inch

pipeline, approximately 4.7 miles long. The pipelines connect to 17 wells. Most of the pipelines operate at less than 100 psig, except for two which operate at 300 psig. All gas is dehydrated and some is compressed prior to delivery to two custody receipt points on AER's transmission system.

105. Terryville Area - The Terryville Area consists of: one 2-inch pipeline, approximately 0.8 miles long; one 3-inch pipeline, approximately 0.3 miles long; and four 4-inch pipelines, ranging in length from approximately 11 feet to 1.3 miles. The pipelines connect to four wells and operate at 350-400 psig. The gas is dehydrated by the producers at the wellhead and delivered to three custody transfer points on AER's transmission system. The area is currently inactive.

APPENDIX B

Intervenors

Agricultural Minerals Corporation
Amoco Production Company and Amoco Energy Trading Corporation
Anadarko Petroleum Corporation
ANR Pipeline Company
ARCO Oil & Gas Company and ARCO Natural Gas Marketing Inc.
Arkansas Gas Consumers
Arkansas Public Service Commission
Arkansas Royalty Membership
Arkansas Western Gas Company

Associated Natural Gas, Inc.
City of Winfield, Kansas
Conoco Inc.
El Paso Natural Gas Company
Illinois Power Company
Indicated Shippers
Laclede Gas Company
Louisiana Gas Service Company, a Division of Citizens Utilities Company
Louisiana Public Service Commission
Marathon Oil Company
Mississippi River Transmission Corporation
Mobil Natural Gas Inc.
Natural Gas Clearinghouse
New Mexico Energy, Minerals and Natural Resources Department and the
Commissioner of Public Lands for the State of New Mexico
Noark Pipeline System, Limited Partnership
Oryx Gas Marketing Company
Ozark Gas Transmission System
Panhandle Eastern Pipe Line Company
Phillips Petroleum Company and GPM Gas Corporation
Producer-Marketer Transportation Group
Gathering Coalition
Samson Resources Company and Oklahoma Independent Petroleum Association
Seagull Marketing Services, Inc.
Sonat Marketing Company
Tennessee Gas Pipeline Company
Texaco Gas Marketing Inc.
Trident NGL, Inc.

Trunkline Gas Company
Vesta Energy Company
Williams Field Services
Mid-Continent Region Company
Williams Natural Gas Company

APPENDIX D

Arkla Gathering Services Company,
69 F.E.R.C. (CCH) ¶ 61280 (1994)

Arkla Gathering Services Company

Docket Nos. CP94-36-001 and CP94-36-003

FEDERAL ENERGY REGULATORY COMMISSION - Commission

Order on Rehearing and Proposed Default Contract, and Deferring Action on Abandonment Application

December 2, 1994

PANEL:

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, William L. Massey, and Donald F. Santa, Jr.

OPINION:

On June 27, 1994, the Independent Petroleum Association of America (IPAA) filed a motion to intervene out-of-time in Docket No. CP94-36-000 and requested rehearing of an order issued in that proceeding

on May 27, 1994.[1] In addition, the Arkansas and Louisiana Public Service Commissions (the State PSCs), Arkansas Royalty Membership (Arkansas Royalty), Gathering Company, GPM Gas Corporation (GPM), Indicated Parties,[2] and New Mexico Energy, Minerals and Natural Resources Department and the Commissioner of Public Lands for the State of New Mexico (New Mexico) filed timely rehearing requests. On July 20, 1994, the Commission issued an order granting the IPAA's motion to intervene out-of-time. That order also granted the petitioners' requests for rehearing of the May 27 order solely for further consideration. On June 24, 1994, Indicated Parties filed an offer of settlement in this case.[3]

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[1]Arkla Gathering Services Co., 67 FERC 61,257 (1994). On the same day, the Commission issued related orders in several other cases involving gathering issues. See Amerada Hess Corp., 67 FERC 61,254 (1994); Superior Offshore Pipeline Co., 67 FERC 61,253 (1994); Field Gas Gathering Inc., 67 FERC 61,259 (1994); Trunkline Gas Co., 67 FERC 61,256 (1994); Mid Louisiana Gas Co. (Mid Louisiana), 67 FERC 61,255 (1994); Eastern American Energy Corp., 67 FERC 61,258 (1994); and Kansas Gas Supply Corp., 67 FERC 61,252 (1994). Contemporaneously with this order, orders on rehearing are being issued in these proceedings, except in Amerada Hess Corp. where no rehearing requests were filed.

[2]Indicated Parties consist of the Producer-Marketer Transportation Gathering Coalition (Producer-Marketer Coalition), Vesta Energy Co., and Indicated Shippers. Indicated Shippers consist of Amoco Production Co., Amoco Energy Trading Corp., Anadarko Petroleum Corp., ARCO Oil & Gas Co., ARCO Natural Gas Marketing, Inc., and Marathon Oil Co. Indicated Shippers also filed a protest to Gathering Company's proposed default contract filing.

[3]On October 14, 1994, Aquila Energy Resources Corp., a member of Producer-Marketer Coalition, filed a notice of withdrawal from the Offer of Settlement in which it states that it was listed as a

The offer of settlement was identical to one filed in the Mid Louisiana proceeding. We will deny rehearing in part and grant it in part, as discussed below. We will clarify several issues.

On October 4, 1994, Gathering Company filed its proposed default contract in Docket No. CP94-36-003. We will require Gathering Company to modify its proposed default contract to conform with the discussion below.

I. Background

In Docket No. CP94-36-000, Gathering Company requested a declaratory order finding that the facilities located in 105 areas in Arkansas, Louisiana, Oklahoma, and Texas that it intends to acquire from NorAm would be exempt gathering facilities under section 1(b) of the Natural Gas Act (NGA). In the May 27 order, the Commission issued a preliminary determination finding that the facilities would be exempt gathering facilities under the primary function test after certain preconditions were met.[4]

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member of Indicated Parties without its knowledge or consent, and that it does not fully support the position taken or the procedures used by Indicated Parties.

[4]The primary function test articulated in Farmland Industries, Inc., 23 FERC 61,063 (1983), as modified in Amerada Hess Corp., 52 FERC 61,268 (1990), is the standard used to determine whether specific facilities are gathering or transmission in nature.

In the May 27 order, the Commission found that Gathering Company is not a natural gas company. Therefore, the Commission has no jurisdiction to regulate Gathering Company's rates and services just because its affiliate, NorAm, is an interstate pipeline.[5] However, the Commission explained that if an affiliate gatherer acts in concert with its pipeline affiliate in connection with the transportation of natural gas in interstate commerce and in a manner that frustrates the Commission's effective regulation of the interstate pipeline, then the Commission would look through, or disregard, the separate corporate structures and treat the pipeline and gatherer as a single entity.

Under that circumstance, a customer of either the pipeline or the affiliate could bring a complaint before the Commission against the pipeline, which for the purposes of the complaint proceeding, would include the affiliate. Further, in the May 27 order, the Commission required

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[5]See n. 1. Many of the issues addressed in the May 27 order in this proceeding and by the other May 27 gathering orders also were raised in Docket No. RM94-4-000, where the Commission requested comments on a number of gathering issues and held a public conference to further solicit information on this topic. See Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates -- Issues Related to Rates and Terms and Conditions of Service (Notice of Public Conference), 65 FERC 61,136 (1993). Instead of issuing an order in Docket No. RM94-4-000 addressing these issues generically, however, the Commission chose to address many of the issues in individual, pending cases, including the instant proceeding.

NorAm to include two standards of conduct in its tariff that would guard against the risk of affiliate abuse.[6]

Also in the May 27 order, the Commission articulated its policy that gathering customers of an interstate pipeline have a reasonable expectation that their services will not be arbitrarily terminated in the event the interstate pipeline transfers the gathering facilities to an affiliate or an independent entity. The Commission held that before it will grant a final determination on the status of the facilities, Gathering Company must demonstrate that it has negotiated private contracts with NorAm's existing gathering customers for continued service. If Gathering Company and any existing customers are unable to negotiate such contracts, it must offer continued service to NorAm's existing customers under a default contract, or pro forma agreement, which provides for service under rates, terms and conditions not inconsistent with those prevailing in the region for gathering service.

The May 27 order also stated that the presence or absence of gathering competition in a particular area has no bearing on the Commission's authority to regulate affiliated gatherers.[7] Additionally, the Commission found that it would be burdensome and time consuming to

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[6]NorAm filed the tariff provisions on June 24, 1994. They were approved by the Commission by a letter order dated July 22, 1994.

[7]The Commission's policy on competition was articulated in greater detail in the Mid Louisiana order.

determine, on a case-by-case basis, whether competition existed for gathering, especially since it appeared that no consensus regarding the standard by which competition should be measured exists within the natural gas industry. Given that the continuation of service condition imposed by the Commission should protect existing customers' reasonable expectations for continued service, the Commission concluded that an inquiry into whether competition exists in a particular region was unnecessary.

Finally, in the May 27 order, the Commission found that the facilities that Gathering Company intended to acquire from NorAm that were reported in NorAm's year-end budgetary certificate reports were certificated for purposes of NGA section 7(b). Therefore, the Commission required NorAm to file an application to abandon those facilities.[8]

II. Procedural Matters

A. Docket No. CP94-36-001

1. Offer of Settlement

On June 24, 1994, Indicated Parties filed an Offer of Settlement under Rule 602 of the Commission's regulations. Indicated Parties' settlement offer provides that the Commission withdraw the May 27, 1994 order

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[8]On June 25, 1994, NorAm filed an application in Docket No. CP94-628-000 requesting authorization to abandon those facilities.

and substitute Indicated Parties' proposed Order on Settlement. In general, the proposed Order on Settlement sets specific standards for implementing Gathering Company's default contract. It also provides that, if approved, all parties would agree to waive: (1) their rights to judicial review of the Commission's decision and (2) any claims in other forums that the States lack jurisdiction to regulate gathering by pipeline's affiliates.

Three parties[9] filed comments in support of Indicated Parties' proposal, stating that the settlement is an appropriate means of clarifying and implementing the Commission's gathering policy. Five parties[10] filed comments objecting to the settlement in its entirety. The State PSCs jointly filed be comments in which they argue that the Indicated Parties' proposal incorporates deregulation that is in violation of the NGA.

Transcontinental Gas Pipe Line Corporation, which is not a party to the proceeding, filed a letter with the Commission stating that it opposed the proposed offer of settlement. In Docket No. RM94-4-000, the Interstate Natural Gas Association of America (INGAA) filed a

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[9]Arkansas Gas Consumers, New Mexico Energy, Minerals, and Natural Resources Department and the Commissioner of Public Lands for the State of New Mexico, and the IPAA.

[10]ANR, Gathering Company, GPM., NOARK Pipeline Systems L.P., and Williams Field Services Mid Continent Region Company.

letter in opposition to the settlement,[11] and the Natural Gas Supply Association filed a letter in support of the settlement.

Indicated Parties' proposal is a settlement in name only. The Commission has stated that "[a] settlement, by definition, implies that there has been some sort of give-and-take and opportunity for customer participation."[12] Specifically, a settlement should be the product of numerous discussions, compromises, and extensive negotiations designed to resolve the issues.[13] Here, Indicated Parties' proposal is a unilateral act, by Indicated Parties' own admission, where none of the other parties to the proceeding had an opportunity to participate and have their views considered.[14]

Even if Indicated Parties' proposal were a legitimate settlement, we would reject it because: (1) the other parties' objections to the proposal essentially have

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[11]Indicated Parties filed comments to INGAA's letter in this proceeding.

[12]Transcontinental Gas Pipe Line Corp. (Transco), 37 FERC 61,288 at 61,868 (1987).

[13]See El Paso Natural Gas Co., 50 FERC 61,202 at 61,653 (1990).

[14]See Transco, 37 FERC at 61,869.

rendered it ineffective;[15] (2) the terms of the proposal conflict with the Commission's intended policy,[16] as discussed below in the context of the discussion of rehearing issues; and (3) it would be a waste of administrative resources to attempt to process the proposal under Rule 602 procedures.[17] However, we will treat Indicated Parties' proposal as a supplement to its rehearing request and consider it on its merits in our responses to the requests for rehearing.[18] We find the rehearing process is a more appropriate vehicle for the Commission to consider Indicated Parties' proposals.[19]

This order will not specifically address paragraphs (E), (H), (I), or (J) of Indicated Parties' proposal because these provisions represent what the procedural result of the settlement would be if the Commission approved it.

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[15]Cf. Columbia Gulf Transmission Co., 34 FERC 61,408 at 61,773 (1986).

[16]Tennessee Gas Pipeline Co., 32 FERC 61,347 at 61,788 (1985).

[17]Pacific Gas Transmission Co., 54 FERC 61,035 at 61,148 (1991).

[18]See Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, 224 (D.C.Cir.), cert. denied, 364 U.S. 913 (1960)(proposal that was ineffective as a settlement nevertheless "appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative. . . ")

[19]See Kansas Gas and Electric Co., 20 FERC 61,092 at 61,200 (1982)(the Commission dismissed a unilateral settlement in an order on rehearing where it addressed and denied rehearing of an identical issue raised in both the settlement and the rehearing request).

Further, the order will not comment on paragraphs (A), (D), and (G) because these provisions duplicate ordering paragraphs already in the May 27 order or matters discussed within the body of the May 27 order.

2. Late Intervention

On October 14, 1994, NJR Energy Corporation (NJR) filed a motion to intervene out-of-time. NJR states that it is engaged in the production and development of natural gas. It states that approximately 70 percent of its gas production is currently attached to the subject facilities to be transferred to Gathering Company. NJR contends that it expected negotiations with Gathering Company would result in the timely execution of a new contract. It states that " to the contrary, however, those negotiations have yet to produce an agreement, and it does not appear that a resolution is imminent."[20] Therefore, it states that its participation in this proceeding is necessary to adequately represent its interests.

We find NJR has shown an interest in this proceeding, and its participation will not delay the proceeding or prejudice the rights of any other party. Accordingly, for good cause shown, we will grant its late motion to intervene.

3. Other Issues

Indicated Parties argues that the Commission erred in

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[20]NJR's motion to intervene, at p. 3.

denying its request to join NorAm, Texas Eastern Transmission Corporation (Texas Eastern), and ANR Pipeline Company (ANR) as additional parties to this proceeding. Indicated Parties provides no further explanation as to why these parties are essential to our decision here other than that the Commission provided no justification for not joining the parties. As noted in the May 27 order, Texas Eastern's application to acquire certain NorAm properties in Docket No. CP93-598-000 was withdrawn. ANR's application in Docket No. CP89-2195-002 involves the purchase of an interest in transmission, not gathering, facilities. Neither of those proceedings involves the facilities at issue here. Therefore, we see no need to join Texas Eastern or ANR as parties to this proceeding. Indicated Parties' request for rehearing on this issue is denied.

Indicated Parties and the State PSCs argue that the Commission erred in denying their requests for a full evidentiary hearing and/or technical conference. Indicated Parties refers to several questions relating to, among other things, the relevance of competition to the Commission's regulation of gathering that the Commission raised in the Notice of Public Conference in Docket No. RM94-4-000. It contends that these question are particularly relevant to this proceeding, and that they must be applied to Gathering Company in a full evidentiary hearing and/or technical conference.

We disagree. As stated in the May 27 order, an evidentiary trial-type hearing is necessary only where material issues of fact are in dispute that cannot be

resolved on the basis of the written record.[21] The Commission found that there were no disputed issues of material fact in this proceeding. Therefore, the record in this proceeding was sufficient to support a decision on the merits. Further, the questions from the public conference that Indicated Parties refers to reflect issues of policy, not fact, and Indicated Parties has had sufficient opportunity through its written comments in the rehearing request and settlement offer to put forth its position on the Commission's policy in that area. Rehearing on this issue is denied.

B. Docket No. CP94-36-003

As stated, on October 4, 1994, Gathering Company submitted a proposed default contract in a compliance filing. The IPAA and Arkansas Royalty, filing jointly, Indicated Shippers,[22] and Oklahoma Independent Petroleum Association (Oklahoma Association) filed protests to Gathering Company's proposal.[23] The

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[21]See, e.g., Southern Union Gas Co. v. FERC, 840 F.2d 964, 970 (D.C. Cir. 1988); Cerro Wire & Cable Co. v. FERC, 677 F.2d 124 (D.C. Cir. 1982); Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

[22]Indicated Shippers is a subset group included in Indicated Parties. See footnote 2.

[23]Additionally, Amoco Production Co. and Amoco Energy Trading Co. (Amoco) jointly filed comments to one of Gathering Company's response to a data request.

proposed default contract and protests are discussed in more detail in section G below.

In its October 4 compliance filing in which it proposed a default contract and in subsequent submissions in response to Commission data requests, Gathering Company submitted certain information for which it requests privileged treatment under section 388.112 of the Commission's regulations. Generally, the information includes gathering contracts of independent gatherers and contracts that Gathering Company has negotiated with NorAm's existing customers. Gathering Company states that the information in these contracts is confidential and is used as a proprietary tool by Gathering Company in its business.

Similarly, in its response to a Commission data request, Indicated Shippers also requests privileged treatment for certain contracts it has filed.[24] Additionally in the response, Indicated Shippers filed a contingent motion for a protective order to govern the use of the submitted contract material. Indicated Shippers contends that the Commission's regulations and policy require that those seeking privileged treatment of filed documents must tender a proposed protective order to all parties

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[24]Specifically, Amoco, Anadarko Petroleum Corp., Conoco, Inc., Marathon Oil Co., Mobil Natural Gas, Inc., Texaco Inc. and Texas Gas Marketing, Inc. (jointly), and Vastar Resources, Inc. filed contracts in response to a data request sent to Indicated Shippers for which they request privileged treatment.

and, in the absence of an agreement, to the Commission.[25] In its protest, Oklahoma Association objects to Gathering Company's request for privileged treatment for the submitted contracts. It also states, in the alternative, that it would be willing to enter into a reasonable protective order.

The procedures requesting privileged treatment of documents submitted to the Commission are set out in section 388.112 of our regulations. Contrary to the claim of Indicated Shippers, there is no requirement that a party seeking privileged treatment of documents must tender a proposed protective order. Under the provisions of section 388.112(c) and (d), a determination on any claim for privilege is not made unless and until someone seeks release of the document under the Freedom of Information Act.

III. Rehearing Requests and Proposed Default Contract

A. Abandonment and Declaratory Order Conditions

Gathering Company argues that the Commission erred in requiring NorAm to seek abandonment authorization for the facilities that NorAm reported in its year-end budget certificate. It argues that the Commission previously has either vacated such

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[25]Indicated Shippers' protest also raised this argument.

certificates,[26] or has simply found that such facilities were not subject to the Commission's jurisdiction.[27] Gathering Company also argues that it was beyond the scope of the Commission's jurisdiction to require it, a nonjurisdictional entity, to execute gathering areements with NorAm's existing customers. We will deny rehearing on these issues. However, we will clarify and further explain the conditions an interstate pipeline has to meet prior to transferring gathering facilities and/or services.

One of the primary goals of the Commission's Order No. 636 is to "ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible."[28] In the Commission's view, thisgoal was articulated by the Congress in the legislative

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[26]See Tennessee Gas Pipeline Co., 47 FERC 61,029 at 61,092 (1989).

[27]See Arkansas Louisiana Gas Co., 25 FERC 61,336 (1983).

[28]Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (April 16, 1992), III FERC Stats. & Regs. 30,939 at 30,393 (April 8, 1992); order on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), III FERC Stats. & Regs. 30,950 (August 3, 1992); order on reh'g, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC 61,272 (November 27, 1992); appeal re-docketed sub nom., Atlanta Gas Light Co. and Chattanooga Gas Co. v. FERC, No. 94-1171 (D.C. Cir. May 27, 1994).

history of the Natural Gas Wellhead Decontrol Act of 1989 (Decontrol Act).[29] As the House Committee Report to the Decontrol Act stated: "All sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other suppliers."[30]

The Commission's action herein advances the policy goals of Order No. 636 in light of the court's decision in Northern Natural Gas Company v. FERC (Northern).[31] The question addressed by the court in Northern was whether the Commission could, in implementing its "Open Access Order No. 436,"[32] regulate the rates that natural gas pipeline companies charge third-party interstate transportation shippers for moving natural gas on gathering facilities owned by those

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[29]Pub L. No. 101-60, 103 Stat. 157 (1989).

[30]H. R. Report No. 29, 101st Cong., 1st Sess., at 6.

[31]929 F.2d 1261 (8th Cir. 1989), cert. denied, 112 S. Ct. 169 (1991).

[32]Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Stats. & Regs. [Regulations Preambles 1986-1990] 30,665, order on reh'g, Order No. 436-A, FERC Stats. & Regs. [Regulations Preambles 1986-1990] 30,675 (1985), order on reh'g, Order No. 436-B, FERC Stats. & Regs. [Regulations Preambles 1986-1990] 30,688 (1986), order on reh'g, Order No. 436-C, 34 FERC 61,404, order on reh'g, Order No. 436-D, 34 FERC 61,405, order for reconsideration, Order No. 436-E, 34 FERC 61,403 (1986).

pipelines.[33] In arriving at its affirmative answer to the rates question, the court explicitly recognized that gathering provided by interstate pipelines in connection with jurisdictional transportation is a service within the scope of the Commission's authority under sections 4 and 5 of the NGA. Specifically, in the words of the court:

> In the case at hand, we address the nexus between the 1(b) exclusion of gathering and the 4 and 5 authority to regulate services in connection with jurisdictional transportation.[34]

Hence, in Docket No. RS92-3-000, NorAm's restructuring proceeding, the Commission required NorAm to file separately stated rates for the gathering services it currently provides in connection with its jurisdictional transportation.[35] In our view, a natural corollary to the requirement to file its gathering rates is a requirement to submit for Commission review any proposal to change - or, as in this case, to terminate - some or all of the rates or services embodied in the rates. We are of the view that the regulatory scheme established by the NGA cannot be effectuated if a natural gas company is free to terminate services subject to the

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[33]929 F.2d at 1262-63.

[34]929 F.2d. at 1272. (Emphasis added)

[35]See Arkla Energy Resources, 62 FERC 61,076 (1993).

Commission's rate authority without obtaining prior approval. Even if the states are able to regulate the rates charged by non-pipeline gatherers, for instance, we think the states are not in a position to protect the expectations of existing customers at the point that the pipeline decides to exit from the market for gathering. If the Commission lacked authority to intervene at this point, it would create a regulatory gap, contrary to the intention of Congress when it enacted the NGA.[36] We do not interpret the Commission's authority under the NGA so narrowly. As explained below, we believe the NGA provides the Commission with sufficient authority to protect consumers of pipeline services at this critical transition.

In the Commission's view, the reasoning of the court expressed in Northern as it applied to rates for gathering services also supports our action here. The court reasoned that "permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the pipeline to establish rates for the interstate transportation."[37] Similarly, allowing the interstate pipeline to make an otherwise unregulated transfer of the very facilities through which those gathering services were performed would allow the pipeline to determine whether its termination of jurisdictional services is in the public

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[36]See, e.g., FPC v. Transcontinental Pipe Line Corp., 331 U.S. 682 (1947).

[37]929 F. 2d. at 1270. (Court's emphasis)

interest. Just as the court was concerned that if the pipeline's gathering rates went unregulated, the pipeline could grant forbidden preferences in interstate transportation or create an "undue preference or advantage," so too would failure to review the termination of the gathering services here create opportunities for that very situation to occur, as well as creating potential obstacles to open-access transportation.[38]

We believe that an interstate pipeline's termination of gathering services that are subject to the Commission's jurisdiction under sections 4 and 5 of the NGA constitutes a change in service which is within the scope of NGA sections 4(d) and 4(e). Thus, we find the termination of a pipeline gathering service constitutes a "change in service" that must be justified as being consistent with the public interest in the context of the procedures established by NGA sections 4(d) and 4(e).[39] In so holding, we note that terminating such a gathering service in essence terminates the availability of the bundled

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[38]Id.

[39]See Pennsylvania Water & Power Co., et al. v. Federal Power Commission, et al., 343 U.S. 414, 423-424 (1952) (Pennsylvania Water & Light Co.). While in Pennsylvania Water & Light the Court was interpreting section 205(d) of the Federal Power Act (FPA), in a later case interpreting sections 4(d) and (e) of the NGA [Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 156 (1959)], the Court, citing its earlier decision in Pennsylvania Water & Light pointed out that section 205 of the FPA is to the "same effect" as the NGA. See, e.g., Indiana & Michigan Electric Co., et al., 12 FERC 61,007, n.8, (1980).

gathering/transportation service provided by the pipeline, thus changing the quality of the remaining jurisdictional transportation service as well.

In relevant part, section 4(d) of the NGA requires that:

. . . No change shall be made by any natural-gas company in any such rate, charge, classification, or service, . . . except after thirty days' notice to the Commission and to the public. (Emphasis supplied)

Thus, the proposed cessation of gathering activities through the subject facilities by NorAm, which underlies Gathering Company's request for declaratory order, constitutes a change in a service which is subject to the Commission's jurisdiction under NGA sections 4 and 5. In addition, NorAm's proposed cessation of gathering activities will constitute a change in the quality of jurisdictional transportation service through NorAm's transportation facilities in that NorAm will no longer be able to offer and assure a continuous gathering/transmission service from the producing field through the interstate transmission grid. Accordingly, prior to NorAm's ceasing to provide gathering services through any of the facilities that are the subject of this proceeding, both those facilities included in its budget certificate reports and facilities which have not been certificated, NorAm must be in compliance with the requirements for a proposed change in service mandated by NGA section 4(d).

Specifically, NorAm shall make a filing under NGA section 4 for authorization to terminate its gathering services at least thirty days prior to the proposed effective date of such termination. NorAm's filing shall include the following information: 1) a statement showing the reasons for the termination; 2) a list of the contracts to be terminated, identifying the contract by number and showing the proposed termination date and affected shippers to whom the notice has been mailed; and 3) a list of shippers, if any, that have entered into contracts with NorAm's successor.

NorAm is hereby put on notice that as a condition to our finding, under our NGA section 4(e) authority, that the above proposed change in services will be just and reasonable and in the public interest, we will require that either NorAm or Gathering Company demonstrate that Gathering Company has negotiated private contracts with NorAm's existing customers. If such a demonstration can not be made because Gathering Company is unable to reach agreement with NorAm's customers (or because most shippers have entered into contracts, but there are a few holdouts), NorAm may submit a "default contract" or pro forma agreement which Gathering Company has offered to NorAm's existing customers.[40] The result of this and the other orders on gathering being issued concurrently is that when a pipeline seeks to transfer gathering facilities it must file under section 7 for

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[40]See section G. 1. below for a more detailed discussion of the default contract process.

abandonment authorization for any facilities that are certificated, and under section 4 to terminate service for both certificated and uncertificated facilities.

As stated, Gathering Company filed its proposed default contract in Docket No. CP94-36-003,[41] while NorAm has filed for abandonment authority in Docket No. CP94-628-000. NorAm may incorporate Gathering Company's modified proposed default contract, discussed below, into its abandonment application for the certificated facilities and its section 4 filing for all of the subject facilities.

The Commission's action in this proceeding is also grounded upon well established continuity of service principles.[42] Continuity and stability of service are the primary considerations in assessing the public convenience and necessity of a permanent cessation of service under section 7(b) the NGA.[43] Additionally, in determining whether a proposed cessation of service, either under

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[41]See section G. 2. below for the detailed discussion of Gathering Company's proposed default contract.

[42]These continuity of service principles were developed in the context of assessing the public convenience and necessity of the abandonment of certificated facilities and services under section 7(b) of the NGA. Because we are addressing herein issues of the termination of jurisdictional services, albeit services provided through facilities that are not subject to a section 7 certificate, we believe that similar principles must apply.

[43]See, e.g., Gulf Oil Corp. v. FERC, 575 F.2d 267 (3rd Cir. 1978); Farmland Industries, Inc., 349 F.Supp. 670 ((D.C. Neb. 1972), affirmed 486 F.2d 315 (3ed Cir. 1973).

section 7(b) or section 4, is in the public interest and/or just and reasonable, it is proper for the Commission to consider the effects of the cessation upon nonjurisdictional companies and markets, even where those markets are subject to regulation by other governmental bodies.[44]

The Commission herein is not imposing any standard of conduct, nor any other regulation, upon interstate pipeline affiliates or upon any other nonjurisdictional entity. Rather, the Commission by this order is stating its intention to condition approval of NorAm's proposed change in service to conform the change to the requirements of the NGA.

Finally, Gathering Company argues that the Commission erred in requiring NorAm to seek abandonment authorization for the facilities that NorAm reported in its year-end budget certificate. It contends that "in prior cases, where the Commission has determined that the facilities under consideration are gathering facilities, [it] has not required the filing of an abandonment application, or has dismissed as moot pending abandonment application."[45]

During the historical period in which NorAm's gathering facilities were constructed and certificated,

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[44]See City of Pittsburgh v. Federal Power Commission, 237 F.2d 741 D.C. Cir. 1956).

[45]Gathering Company's request for rehearing, at p. 20, citing Arkla Energy Resources, 63 FERC 61,265 (1993); Tennessee Gas Pipeline Co., 47 FERC 61,029 (1989).

interstate pipelines operated primarily as merchants that purchased their system sales supplies from producers and other suppliers and then resold and delivered the gas to customers in their market areas. To varying degrees, pipelines obtained their system sales supplies by means of "gathering" facilities constructed and operated by the pipelines themselves to access production. Thus, until the latter part of the 1980's, the Commission's primary pipeline ratemaking concern was with pipeline's bundled city-gate, firm sales services. Gathering costs were bundled into the commodity rate for that service. No gathering costs were classified to the demand charge. Gathering was included with fixed production costs and thereby with gas supply and purchased gas costs.[46]

Under this former regulatory regime, pipelines had an incentive to have their gathering facilities covered by certificates. Certification created a presumption that the facilities were necessary for the interstate transportation of natural gas and, therefore, that the pipeline should be allowed to include the facilities' costs in their jurisdictional rate in order to ensure recovery. In addition, the stability of service implied by a certificate provided a benefit to the pipeline in attracting customers. Because the Commission's ratemaking principles ensured that a pipeline's recovery of costs for jurisdictional services would be cost based, so long as pipelines functioned primarily as merchants, there generally was

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[46]Costs were allocated to transportation only services and transportation in connection with direct sales on a volumetric basis by test year throughput.

little reason for the Commission to distinguish gathering and transportation facilities in pipeline certificate applications and rate filings.

When the Commission began its initiatives to create a non-discriminatory open-access transportation market, it recognized the need for conditions to ensure strict differentiation of pipeline's gathering costs from transmission costs.[47] Accordingly, Order No. 436 required open access pipelines to identify separately cost components of their Part 284 rates attributable to transportation, storage, and gathering costs.[48] In addition, Order No. 436 initiated the movement toward unbundling of interstate pipeline gathering rates. Subsequently, in Order No. 636, which among other things, mandated the complete unbundling of interstate pipeline sales and transportation services, the Commission expressed its strong preference for fully unbundled gathering rates.[49] It was during the latter stages of this ongoing natural gas industry restructuring that the court's decision in Northern was handed down. Northern blessed the Commission's approach to regulating interstate gathering rates under sections 4 and 5 of the NGA. It is within this historical

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[47]This cost segregation was required to ensure that shippers would pay only for those services that they receive so that pipelines' opportunity to discriminate against or among its transportation customers would be diminished.

[48]See 18 C.F.R. 284.7(d)(1).

[49]See Order No. 636-A at 30,609 (1992).

context that Gathering Company's contention must be analyzed.

Gathering Company relies on three cases in support of its contention that the Commission lacks authority to require NorAm to obtain abandonment authorization prior to conveying the facilities which were authorized by budget certificates. However, of these three, only Arkla Energy Resources (Arkla Energy),[50] was decided after the date of the decision in Northern (April 4, 1991). However, while the Commission in Arkla Energy did dismiss a complaint regarding the transfer of certain gathering facilities without prior abandonment authorization,[51] the Commission also granted abandonment authority for certificates related to other facilities which it found to be properly classified as gathering.[52]

The order in Tennessee Gas Pipeline Company

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[50]63 FERC 61,265 (1993).

[51]The record presented to the Commission in Arkla Energy did not represent that any of the facilities which were the subject of the declaratory order had been certificated under budget certificates.

[52]63 FERC at 62,721. The Commission in Arkla Energy did allow gathering facilities to be spun-off without the type of conditions we have imposed in the instant proceeding. However, the Commission at that time did not have the benefit of its recently concluded generic inquiry and review of interstate pipeline gathering in Docket No. RM-94-001 which resulted in the Commissions new spin-off policy as applied in the instant case.

(Tennessee),also cited by Gathering Company[53] was issued nearly two years prior to Northern. Moreover, the facilities declared to be gathering facilities in Tennessee were to be spun off to the existing shippers through those facilities. In addition, the subject facilities in Tennessee were located on the Outer Continental Shelf (OCS) and were accordingly subject to the pro-competitive and non-discriminatory access provisions of the Outer Continental Shelf Lands Act.[54] Due to these factors, continuity of service to existing shippers, as well as non-discriminatory access to potential shippers, were not issues in the case. Accordingly, whether or not abandonment authorization was required was not a subject of critical analysis in Tennessee.

Similarly, the order in Arkansas Louisiana Gas Company (Arkla),[55] on which Gathering Company also relies, was decided long before the date of the decision in Northern. Moreover, the relevant portion of the facilities in Arkla, rather than being gathering facilities which were "mistakenly" included in Arkla's budget certificate, were local distribution facilities which were not the facilities being used to render the jurisdictional service for which budget certification had been applied for and

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[53]Tennessee Gas Pipeline Co., Docket No. CP88-400-000, 47 FERC P61,029 (1989).

[54] See, e.g., 43 U.S.C. 1334(f).

[55]25 FERC 61,336 (1983).

obtained. Finally, the fact that the order in Arkla did not address these facilities does not translate into the Commission's agreement with the contention advanced therein by Arkla that an order vacating its certificate was not necessary because the facilities were not being used to perform a jurisdictional service.

Moreover, Gathering Company has ignored a number of other cases in which the Commission has authorized abandonment, rather than vacation, of certificates of public convenience and necessity for certificated facilities subsequently found to be nonjurisdictional.[56] Additionally, in Freeport-McMoran, Inc., et al.,[57] the Commission reiterated its opinion that a certificate imposes on the recipient a service obligation that may not be ignored if the certificate holder later decides that under prevailing law or changed circumstances the facilities appear to be nonjurisdictional. Under such circumstances if the holder of a certificate desires to change that status, the proper course is to seek a ruling removing the uncertainty. We believe that this opinion should be equally applicable to facilities which have been certificated as a result of a subsequently discovered "mistake".

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[56]See K N Energy, Inc., et. al. 63 FERC 61,155 (1993); Freeport-McMoran, Inc., et. al, 64 FERC 61,189 (1993); Northwest Pipeline Corp., et. al 59 FERC 61,115 (1992), reh'g denied 60 FERC 61,213 (1992).

[57]64 FERC 61,189 (1993).

While the Commission has in the past sometimes vacated and sometimes authorized abandonment of certificates covering nonjurisdictional facilities, in light of the fundamental changes occurring in the structure of the natural gas industry and the Commission's need to protect the public interest during those changes, we believe the better approach for the future is to require abandonment of such certificates under 7(b). NorAm reported approximately 20 percent of the facilities which are the subject of this order in its year-end budgetary certificate report. NorAm used these facilities to render a bundled gathering/transportation service. Under these circumstances, the facilities, having had the advantages bestowed by Commission certification, NorAm requires Commission authority to abandon them.

B. Primary Function Test

Arkansas Royalty and Indicated Parties argue that the Commission needed more information to determine the primary function of the facilities. In its rehearing request, Indicated Parties refers to a list of questions the Commission required Panhandle Eastern Pipe Line Company and Panhandle Gathering Company (Panhandle companies) to respond to in their gathering proceedings in Docket Nos. CP93-505-000 and CP93-506-000. Indicated Parties argues that it was arbitrary and capricious for the Commission not to also require Gathering Company to answer similar questions.

Arkansas Royalty contends that more detailed maps are necessary to determine the demarcation between

the gathering and transmission facilities. Specifically, it states that the Commission failed to consider how the various segments relate to the configuration of the total NorAm system. Arkansas Royalty argues that Gathering Company and NorAm cannot function as separate corporate entities because the facilities are integrated and interdependent on one another.

As stated in the May 27 order, the existing record was sufficient for the Commission to reach a fully informed decision concerning the jurisdictional status of the subject facilities. Therefore, no additional information was needed. None of the petitioners have raised any new arguments on the need for additional information that would warrant any further discussion on that issue here.

In response to Indicated Parties argument that the Commission should have required Gathering Company to file similar information that it required of the Panhandle companies, we note that the restructuring of the interstate pipeline industry under Order No. 636 has required that the Commission review its policy towards pipeline and pipeline affiliated-owned gathering services. In reviewing its policy in different pending proceedings, the Commission asked for different degrees of information from pipelines who applied to either "spin-down" or "spin-off" their gathering facilities. The Commission also convened the public conference to compile even more information to conduct a thorough review of its current policy for gathering. The fact that the Commission did not require identical information in all of the proceedings is not unusual. The type of information obtained from

one company in one proceeding at a particular time may not be relevant in another proceeding at another time.

GPM states that the Commission failed to consider the nature and the function of field area facilities that NorAm will retain. Specifically, GPM argues that NorAm may be planning to retain field area compression equivalent to that performed by independent gatherers, thereby reducing Gathering Company's costs of performing its gathering business. Further, GPM contends that if NorAm retains field area gathering compression the competing gatherers and their suppliers must pay inflated transmission fees that include gathering compression.

Gathering Company has stated that it will acquire all of the on-shore gathering facilities of NorAm.[58] NorAm is only retaining an interest in two off-shore gathering lines. Therefore, after the transfer, NorAm should no longer be performing any on-shore gathering services, including field area compression. Accordingly, it should not be charging for any field area compression in conjunction with its transmission services. If GPM believes that NorAm is recovering the costs of field area compression in its transmission rates, GPM may raise that issue in NorAm's pending rate case in Docket No. RP94-343-000.

Finally, Indicated Parties argues that the

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[58]Gathering Company's answer to protests, at 7, note 1.

Commission erred in concluding that the facilities perform a gathering function because it failed to address Indicated Shippers' observations that some of the facilities are certificated and that NorAm has represented in rate cases that its "gathering" was actually mainline transmission.[59]

In past rate proceedings, the Commission did not apply the primary function test prior to determining how a pipeline would functionalize the facilities in its tariff for rate and accounting purposes. Until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined.[60] How NorAm has represented the status of the facilities in the past is not determinative of the jurisdictional status of the facilities under the primary function test.

C. Jurisdiction

The State PSCs, IPAA, Indicated Parties, and New Mexico argue that the Commission erred in disclaiming jurisdiction over rates, terms and conditions of gathering services. Specifically, they contend that the court's ruling

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[59]Indicated Parties also argues that the Commission failed to address its concerns that the Kibler Area operates at high pressure levels. The Kibler Area operates at 120 to 500 psig, which is not an unusually high operating pressure for a gathering facility. In the May 27 order the Commission addressed the areas that operate up to or over 900 psig, which are considered high operating pressures for gathering facilities.

[60]CNG Transmission Corp., 67 FERC 61,330 at 62,177 (1994).

in Northern dictates that the Commission's NGA sections 4 and 5 jurisdiction applies to gathering services that are performed by jurisdictional pipelines and their affiliates, and that the Commission cannot abdicate its responsibility under the statute.

We disagree. A company must either transport gas in interstate commerce or make jurisdictional sales to be subject to the jurisdiction of the Commission. A pipeline affiliate that does not itself provide any jurisdictional sales or transportation services, is not a natural gas company under the NGA. Nor can a company that performs only a gathering function be treated as a natural gas company simply because it is affiliated with a natural gas company. There is nothing in our regulations which prevents one entity from performing jurisdictional activities, while its affiliate performs nonjurisdictional activities. In fact, affiliates are often formed for the express purpose of separating the jurisdictional and nonjurisdictional activities of a pipeline, and the affiliation between the entities does not subject the nonjurisdictional activities performed by one to this Commission's jurisdiction.[61]

In Northern, the court held that under the NGA's sections 4 and 5, the Commission may regulate rates charged for gathering services provided on an interstate pipeline's own gathering facilities in connection with jurisdictional interstate transportation. As that court recited, section 4(a) of the NGA provides in pertinent

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[61]See Sunshine Interstate Transmission Co., 67 FERC 61,229 (1994); Riverside Pipeline Co., 48 FERC 61,309 (1989).

part that "all rates and charges made . . . by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction . . . shall be just and reasonable." Section 5 provides that if the Commission finds any rate charged "in connection with" any jurisdictional transportation service to be unjust, unreasonable, unduly discriminatory or preferential," the Commission may order a decrease in such rates. The court held that:

> The "in connection with" language of 4 and 5 indicates that Congress, in devising the regulatory scheme, did not draw a formalistic line between direct and indirect regulation. The Congress foresaw the Commission's need for the ability to regulate other aspects of the natural gas industry as necessary to make effective its primary control over interstate transportation and sales.[62]

Thus, the Northern decision established that the Commission has jurisdiction to ensure that rates charged for transportation on the pipeline's own gathering facilities performed in connection with jurisdictional interstate transportation are just, reasonable, and not unduly discriminatory or preferential. The Northern court's definition of gathering facilities owned by a pipeline does not, as the petitioners contend, require that the Commission regulate rates of gathering service provided over facilities owned or operated by a pipeline affiliate. Footnote 2 of the Northern decision states: "as used

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[62]Northern, 929 F.2d at 1271.

herein, the expression 'gathering facilities owned by the pipeline' and all substantially similar expressions are intended to include such facilities owned or operated directly or indirectly by a pipeline or its parent, affiliate, subsidiary or lessors."[63] This footnote must be read in the context of the entire decision, which addresses the Commission's jurisdiction to regulate gathering services provided in connection with the transportation of natural gas subject to the jurisdiction of the Commission. However, the Northern court did not conclude that all gathering services provided by a pipeline affiliate are necessarily provided in connection with the services of the pipeline or that pipeline affiliates that do not provide gathering services in connection with interstate transportation are subject to the Commission's jurisdiction. A gathering affiliate that neither transports natural gas in interstate commerce, nor makes jurisdictional sales, is not a natural gas company under the NGA, and thus does not, in the normal course of business, provide gathering services "in connection with" jurisdictional transportation.

However, as we stated in the prior order in this proceeding, the Commission can and will exert control over the gathering activities of affiliated gatherers in particular circumstances where such action is necessary to accomplish the Commission's policies for the transportation of natural gas in interstate commerce. In Opinion No. 255 we stated, The general rule . . . is that

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[63]Id. at 1263.

an agency may disregard the corporate form in the interest of public convenience, fairness or equity . . . no bad intention on the part of the corporations is necessary; the inquiry is simply a question of whether the statutory purposes would be frustrated by the corporate form.[64] (Citations omitted)

The petitioners point out that the court in Northern states that "there is strong potential for anticompetitive abuses where the company performs both the gathering and the transportation, which do not exist for independent gatherers or producers." Accordingly, if an affiliated gatherer acts in concert with its pipeline affiliate in connection with the transportation of gas in interstate commerce and in a manner that frustrates the Commission's effective regulation of the interstate pipeline, then the Commission may look through or disregard the separate corporate structures and treat the pipeline and gatherer as a single entity.[65] As stated in the May 27 order, such actions might include the affiliate's giving preferences to market affiliate gas or tying gathering service to the pipeline jurisdictional transmission service; the pipeline's giving transportation discounts only to those utilizing the affiliate's gathering services, and actions resulting in cross-subsidization between the affiliate's gathering rates and the pipeline's transmission

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[64]Opinion No. 255, 37 FERC 61,149 at p. 61,356 (1986).

[65]See Northwest Pipeline Corp., 59 FERC 61,115, reh'g denied, 60 FERC 61,213 (1992), pets. for review dismissed sub nom. Williams Gas Processing Co. v. FERC, Nos. 92-9553 et al., (10th Cir. Feb.28, 1994).

rates.

Accordingly, we disagree with the petitioners' contention that the Commission must regulate all affiliate gathering to the same extent as it regulates gathering provided by pipelines. As discussed above, we have no authority to regulate an affiliated gatherer because it is not a natural gas company under the NGA. However, if circumstances develop that would allow the pipeline and its affiliated gatherer to engage together in anticompetitive activity, the Commission will exert jurisdiction over the gathering service to the extent needed to preserve the Commission's statutory mandates under the NGA.

Finally, we note that paragraph (F) of Indicated Parties' settlement offer states that the Commission should invite the states to regulate Gathering Company's services. The May 27 order indicated that states were free to regulate affiliated gatherers. Thus, no formal invitation by the Commission to the states is necessary.[66]

D. Competition

The State PSCs, IPAA, Indicated Parties and New Mexico state that the Commission erred in concluding

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[66]We note that in a letter filed in this proceeding on September 23, 1994, as supplemented with a second letter that was filed on October 24, 1994, the Arkansas Oil and Gas Commission notified the Commission that it intends to hold a hearing concerning a proposed gas gathering agreement that NorAm presented to its current customers for continued service with Gathering Company.

that the presence or absence of gathering competition in a particular area has no bearing on the Commission's authority to regulate affiliated gatherers.[67] The petitioners argue that before the Commission can rely on market-based rates for gathering services performed by affiliates, a finding of competition is mandatory.

The petitioners' argument is predicated on the belief that the Commission has jurisdiction over either pipeline affiliated gatherers or independent gatherers who operate facilities once owned and operated by an interstate pipeline, and that it is obligated to regulate the rates, terms and conditions of affiliate gathering. As discussed above, however, the Commission does not have jurisdiction over gatherers because they are not natural gas pipelines; therefore, it has no authority to regulate the rates for gathering services provided by such gatherers. Under that circumstance, the existence or absence of competition for gathering in an area is irrelevant to whether or not the Commission will regulate affiliates or independent gatherers. It cannot do so because it does not have jurisdiction under the NGA to regulate gatherers.

Further, the Commission did not authorize the abandonment of cost-based ratemaking for gathering in the May 27 orders; rather, it addressed the circumstances

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[67]The State PSCs argue that the Commission erred in issuing its order prior to the resolution of the competition issues in Docket No. RM94-4-000. As stated, instead of issuing an order in Docket No. RM94-4-000, the Commission chose to address the issues in individual, pending cases.

under which certain interstate pipelines would be authorized to abandon their gathering facilities and/or services. If such facilities and services were acquired by a nonjurisdictional entity, the result of the transfer would be that the Commission would cease to regulate the rates, terms and conditions for gathering service. Petitioners suggest that a finding of competition ought to be a prerequisite to abandonment, because the existence of competition would offer existing gathering customers some assurance that they could continue to receive gathering services under reasonable rates, terms and conditions after a transfer and that competition might prevent the gatherer from abusing its market power. However, the existence of competition for gathering service is not the only way to protect a pipeline's existing customers from an arbitrary termination of their gathering service, discrimination or abuse.[68]

As discussed above, the Commission is imposing certain conditions on its finding that NorAm's proposed change, i.e. termination, of services is just and reasonable and in the public interest. Those conditions assure that existing pipeline gathering customers will be able to continue to receive gathering service from a pipeline's successor-in-interest for a reasonable transitional period

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[68]In this regard, the Commission noted in the May 27, 1994 order that a number of commenters in the gathering proceeding, Docket No. RM94-4-000, indicated that gathering customers of non-jurisdictional companies have found ways to exert leverage over gatherers to prevent abuse of market power and the imposition of excess rates, terms and conditions. See Mid Louisiana, 67 FERC 61,255 at n. 9 (1994).

under rates, terms and conditions consistent with those under which the pipeline provided for gathering service.

Further, where an affiliate is involved, the Commission has complaint procedures providing gathering customers a forum in which to raise issues of abuse or discrimination caused by an affiliate and its pipeline acting in concert. An additional protection from this type of abuse is the requirement imposed by the Commission in this case that an interstate pipeline with a gathering affiliate include in its tariff certain standards of conduct governing the relationship between the pipeline and the affiliate.

Conditions protecting the services of existing gathering customers also will be imposed where the transfer of gathering services is to a nonaffiliated entity. A customer will also have recourse to state and federal antitrust laws in instances where anticompetitive behavior on the part of the gatherer arises.

Given the above-referenced protections available to existing pipeline gathering customers upon a transfer of the gathering services to a nonjurisdictional entity, the Commission concluded in the May 27, 1994 order, and affirms here, that a finding of competition is unnecessary in order for the Commission to permit termination of gathering services by a pipeline.[69] Rehearing on issues

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[69]We note that because of the conditions that will be imposed on the Commission's acceptance of a pipeline's NGA section 4 filing, the existence of competition will not be relevant to the section 4 finding of just and reasonableness just as it is not relevant to the

relating to competition is denied.

E. Standards of Conduct

The May 27 order required NorAm to include in its tariff two standards of conduct governing the pipeline's relationship with its gathering affiliate. However, the Mid Louisiana order that was issued the same day contained three standards of conduct. By an errata issued on June 3, 1994, the Commission deleted the second standard which was inadvertently included in the Mid Louisiana order. On rehearing, GPM argues that NorAm should be required to also include the deleted standard in its tariff. Similarly, in the settlement offer, Indicated Parties proposes to restore the deleted standard and to add a fourth standard.

The deleted standard related to information which a pipeline might provide to its gathering affiliate regarding the transportation of natural gas, including capacity release and other available capacity, and required the pipeline to provide such information contemporaneously to all similarly situated gatherers in the field or basin. The standard noted that the requirement could be fulfilled through posting the information on the pipeline's Electronic Bulletin Board (EEB). The reason the Commission deleted this standard is that sections 284.8(b)(3) and (4) and 284.9(3) and (4) of the Commission's regulations already require interstate

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abandonment of certificated facilities when the abandonment authorization is conditioned.

pipelines to post information on their EBBS regarding the availability of capacity on their pipelines on both a firm and interruptible basis. These regulations require that all shippers must receive equal and timely access to such information. Thus, if the pipeline offered capacity to its affiliated gatherer or that gatherers' customers before it posted the availability of that capacity on the EBB, the pipeline would be in violation of the Commission's regulations.

The settlement proposes an additional standard of conduct:

[NorAm] cannot reallocate any Administrative and General costs formerly allocated to the gathering function to be collected in the mainline or storage rates.

We find that this condition is unnecessary. The May 27 order already states that a pipeline and its affiliate may not cross-subsidize each other's operations. To the extent a party believes that the pipeline has misallocated administrative or other costs to its rates, this issue should be raised in a rate case where the pipeline proposes an allocation.[70] We will deny rehearing on the additional standards of conduct proposed in the settlement.

Finally, Gathering Company argues that the ommission should clarify that it intends that all pipelines

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[70]In the instant case, Noram has unbundled its gathering rates from its transportation rates. As such, the transportation rate it has on file does not include costs associated with gathering.

with affiliated gatherers should comply with these standards of conduct. We note that the standards of conduct will be required in all future proceedings involving affiliated gatherers. However, we do not find it necessary at this time to initiate NGA section 5 proceedings for all pipelines that have previously spun down their gathering facilities to an affiliate. Rehearing on this issue is denied.

F. Complaint Mechanism

The May 27 order stated the Commission's position regarding the ability of customers of gathering affiliates to file complaints with the Commission. The Commission explained that where a pipeline and its affiliated gatherer act in concert in a manner that frustrates the Commission's ability to effectively regulate the sale or transportation of gas in interstate commerce, the Commission may disregard the affiliate's corporate form and treat the affiliate and the pipeline as one entity. Under that circumstance, a customer of either the pipeline or the affiliate could bring a complaint before the Commission against the pipeline, which for the purposes of the complaint proceeding, would include the affiliate. The May 27 order described the types of abuses which could prompt customers to bring a complaint action. For example, if the pipeline and its affiliate tied the provision of transportation and gathering services to each other, open access and the Commission's goal of fostering competition in the natural gas industry could be frustrated.

The IPAA and Indicated Parties argue that this complaint mechanism is inadequate to protect small producers from abuses by gathering entities other than interstate pipelines. However, as explained in the May 27 order, the Commission did not intend the complaint mechanism to provide a remedy for all conceivable types of abuse or anticompetitive behavior on the part of a nonjurisdictional gatherer. Rather, the complaint mechanism, as described above, is limited to situations where a pipeline and its affiliate are implicated together in anticompetitive or discriminatory behavior. To the extent the complaint mechanism is available to a producer, i.e., to remedy abuses resulting from a pipeline's and its affiliate's acting in concert, the mechanism will not change as a result of the orders in this proceeding. It does not matter whether a small producer receives gathering service from an interstate pipeline or from an affiliate. If the complaint procedures are lengthy and costly, as the IPAA asserts, the burdens on the small producer in a complaint proceeding have not been increased by the Commission's action here.

Other types of abuse on the part of affiliated gatherers will be subject to the jurisdiction of state authorities, if they regulate the gathering of natural gas, or to federal and state antitrust laws. Such will also be the case for abuses by independent gatherers, where the complaint mechanism before the Commission will never be available. Although small producers will have no protection from the Commission against abuse by an independent gatherer and less protection from abuse by an affiliated gatherer after a transfer of gathering services

by an interstate pipeline, such producers will be essentially in the same position as customers of nonjurisdictional gatherers. In any event, the Commission believes it is speculative at this time to assume that small producers will be victims of abuse after a transfer of the gathering services by an interstate pipeline. As noted above, the comments in Docket No. RM94-4-000 suggest that within the 70 percent of the gathering industry that is not regulated by the Commission, instances of abuse have been rare.

The IPAA also argues that because small producers may have had some protection from abuse if they took their gathering service from a interstate pipeline, this protection should continue indefinitely. The only way this could occur would be for the Commission to decline to approve abandonment applications or NGA section 4 filings relating to gathering service. The Commission has concluded, however that the transfer of gathering services by an interstate pipeline to another entity, either an affiliate or an independent gatherer, is consistent with the unbundling policies of Order No. 636, and that such transfers, in the long run, should promote competition within the gathering industry. Moreover, since interstate pipeline gatherers are to some extent constrained by Commission regulation in their ability to offer flexible gathering services under a variety of arrangements, the Commission believes that customers will ultimately benefit by obtaining gathering services from nonjurisdictional entities who can provide more flexible services. Thus, the Commission has concluded that, provided existing customers' services are not arbitrarily terminated, it is

generally in the public interest for interstate pipelines to transfer their gathering facilities and functions to separate entities.

The IPAA's and Indicated Parties' request for rehearing on the issue of whether the complaint mechanism is adequate to protect small producers from abuse by gatherers is denied.

G. Default Contract

1. Requests for Rehearing and Clarification

a. Issues

A number of petitioners assert that because the May 27 order did not adequately address or resolve certain issues relating to the provision for default contracts, rehearing should be granted or clarification provided. As discussed below, we are granting the various requests for rehearing on the default contract issues to the extent discussed below, and clarifying certain aspects of the default contract process.[71]

GPM posits that since the default contract is only meant to be a transitional vehicle to assure existing pipeline gathering customers continued gathering service, the Commission must not allow the process to become a

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[71]As stated, on October 4, 1994, Gathering Company filed a proposed default contract, which is discussed in more detail later in this order.

source for delay in acting upon spin-down or spin-off proposals. Arkansas Royalty requests clarification on a number of issues, including: how a particular region will be defined in order to compare the terms of the default contract with terms and conditions for other gathering services in the area; how independent gatherers will be determined for comparison purposes and what will happen if there is no independent gatherer in the region; how a pipeline will provide evidence to support the terms of the default contract when other gathering contracts are private and not necessarily available; how long the default contract will be effective, how it may be changed, and who will have jurisdiction over the contract after the transfer; and what procedure will the Commission use to review the default contract.

Gathering Company requests rehearing on the default contract condition because it believes the review process can be used by gathering customers to delay a transfer of facilities.

Specifically, Gathering Company predicts that customers opposed to the transfer can refuse to enter into private contracts, force the pipeline to file a default contract, and then oppose the contract in a long, drawn out proceeding before the Commission. In other words, customers who believe that the default contract would offer them better terms than they can negotiate themselves will seek to force the gatherer into filing a default contract. Additionally, Gathering Company argues that the condition requiring it to report to the Commission on its negotiations with customers and/or file

a default contract will place an unfair burden on it because its competitors are not required to file such contracts.

Further, Gathering Company contends that the default contract condition does not protect any reasonable expectations that the pipeline's gathering customers may have had because contracts for gathering service from the pipeline were not required to be filed and the pipeline did not have to file a tariff covering the gathering service. Thus, the pipeline's customers will get more protection from the nonjurisdictional gatherer, through the default contract, than they had when the pipeline was providing the service. In a related argument, Gathering Company notes that many of the pipeline's gathering customers have entered into 30-day contracts with the pipeline, in part because the customers wanted the flexibility to switch to service from a gathering competitor. If the default contract process results in these customers' obtaining service commitments for a longer period, the transferee will be obligated to provide service for a longer period of time than the pipeline.

Gathering Company argues that in light of the incentives the pipeline's transferee will have to obtain as much business as possible, it is unlikely that any customer's service would be arbitrarily terminated upon a transfer of the gathering facilities. Moreover, if a gathering company refuses to deal with customers for reasons other than valid business or economic reasons, federal and state antitrust laws are available to a customer, and in the case where an affiliated gatherer acts

in concert with its pipeline, the Commission's complaint mechanism is available. Thus, Gathering Company takes the position that the default contract condition is not required to protect customers.

Both the IPAA and Indicated Parties assert that the Commission failed to set adequate standards for the default contract or the review process. The IPAA also requests clarification regarding whether the default contract will constitute the filed rate for the gathering service, whether the default contract can be changed and, if so, through what procedures, and whether such default contracts can be found to provide for just and reasonable rates, terms and conditions.

b. Response

GPM and Gathering Company both have expressed concern that the default contract process will become unnecessarily burdensome for pipelines, their transferees, gathering customers, and/or the Commission. We do not agree. The Commission expects that in most instances a pipeline's successor-in-interest and the existing gathering customers will have been able to enter into mutually satisfactory contracts for continued service before the pipeline files to change its gathering services and/or abandon facilities.

As our May 27 order in this proceeding explicitly provided, a default contract need only be filed by a pipeline seeking to terminate its gathering services and spin off facilities to a nonjurisdictional gatherer, if some

or all of the pipeline's existing customers and the pipeline's proposed successor-in-interest have been unable to enter into privately negotiated contracts for continued service. The Commission further explained in its May 27 Mid Louisiana order that if there are no protests to the application for abandonment by the pipeline's existing customers, the applicant does not have to make a showing that the successor-in-interest and the existing customers have entered into privately negotiated contracts. This same principle will apply to applications under section 4 to change/terminate gathering service. Before a pipeline files an application for authority to terminate gathering services under NGA section 4 and/or to abandon gathering facilities under section 7, every reasonable effort to negotiate satisfactory arrangements for continued service to the pipeline's existing customers should have been made. Only if such arrangements cannot be made must the pipeline file a default contract that sets forth rates, terms and conditions under which the successor-in-interest will provide gathering service to the pipeline's existing customers.

The successor-in-interest and existing customers should have an incentive to negotiate private contracts because the terms and conditions of a default contract may be less desirable than what the parties may be able to negotiate privately. Privately negotiated contracts can be tailored to the specific needs of the customer and can offer flexible packages of services. A default contract, on the other hand, will contain generic provisions.

Second, even where a default contract is protested

by existing customers, significant delay in the section 4 and/or abandonment proceeding will not necessarily result. In most instances, the Commission will be able to evaluate the default contract based upon the filings by the parties. Since the application may be protested on other grounds, approval of the default contract will be only one issue the Commission must consider. Further, in light of the guidelines for the default contract outlined below, we believe there will be few protests to a default contract.[72]

In response to the comments of IPAA and Indicated Parties, we reiterate that the Commission will not have jurisdiction over the rates, terms and conditions of the gathering service to be offered by the pipeline's successor-in-interest. Therefore, the default contract is not meant to be the filed rate nor will the rates, terms and conditions of the successor need to meet the standard of just and reasonable that applies to the rates of natural gas companies under NGA sections 4 and 5.[73] The

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[72]In the unlikely event more information is needed to reach a determination regarding the default contract, the Commission has several procedures it may invoke which will not involve significant delay. For example, the Commission can issue data requests, as it has done in the instant case, order another cycle of pleadings, or hold a technical conference. Only in the rare case would it be necessary to hold a formal hearing.

[73]We note that the just and reasonable standard will not apply to a default contract itself, if one must be filed. Rather, the Commission will be able to determine that the change, i.e., termination, in gathering service proposed by the pipeline is just and reasonable if the transferee will continue to provide service under privately negotiated contracts or under a default contract with reasonable terms, conditions and rates. The reasonableness standard

default contract is intended only to provide a transition mechanism so that existing customers will not have their gathering service arbitrarily terminated in the event of a transfer of gathering services by an interstate pipeline to a nonjurisdictional entity. The linchpin of the Commission's default contract condition is that the Commission can find that a proposed termination of gathering services by an interstate pipeline company is just and reasonable only if existing customers' current expectations that their gathering service will continue for a reasonable period in the event of a transfer are met. Rehearing is denied on the issues of whether the default contract process was adequately established and whether that process will unduly delay spin-down or spin-off proceedings.

In response to Gathering Company's contention that the default contract process will afford customers more rights than they currently have under gathering contracts with the pipeline, we note that while pipeline gatherers are currently not required to file their gathering contracts, their customers have recourse to the Commission regarding any complaints or problems with their service. Once a pipeline's gathering service is spun off to a nonjurisdictional entity, the provisions of the contract will be the only protection the customers will have. Moreover, unlike a tariff, the provisions of the default contract will be subject to change pursuant to the terms of the contract, (except, as discussed below, that at

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will be met if the rates, terms and conditions of the default contract are consistent with the guidelines discussed below.

least a two-year term must be offered initially if the customer wants it) and such changes need not be filed with the Commission.

While the contract negotiation process and/or default contract process may result in 30-day customers obtaining contracts with longer terms, we do not think this result is unfair. Offering customers the possibility of obtaining longer term contracts merely recognizes that some customers may have entered into such short-term contracts with the pipelines because the Commission's open access policy assured that these customers could come back onto a pipeline's system if capacity became available. Since nonjurisdictional gatherers are not subject to the Commission's open access requirements, 30-day contract customers, if the gatherer merely assumes such contracts, could find themselves unable to receive gathering services when the contracts expire. Additionally, the Commission recognizes that some 30-day customers may have been willing to enter into short-term contracts with the pipeline gatherer because even under such contracts, these customers were assured rate certainty, i.e., the pipeline could not increase its filed gathering rates without Commission review. In order to allow a reasonable transition time, we think it reasonable to offer existing customers the opportunity to negotiate longer term contracts or to obtain at least two years of service under a default contract. However, the parties can agree to retain the 30-day term or to develop any other contract term, except, as will be discussed below, that the default contract must offer at least two years of service, unless a shipper wants a shorter term or a gatherer offers

a longer term. Rehearing on this issue is denied.

We reiterate that the Commission expects that most pipeline gathering customers will negotiate with a proposed successor-in-interest for gathering service under rates, terms and conditions tailored to the specific needs of the customers. The default contract is viewed as a substitute for privately negotiated contracts only where that process fails. In general, the Commission believes that both the providers of unregulated gathering service and the customers will find it to their advantage to negotiate private contracts in good faith because of the greater flexibility that will be available to the parties to fashion arrangements responsive to each customer's needs. A default contract could provide less advantageous rates, terms and conditions.

Regarding the terms of the settlement offer which we are treating as part of Indicated Parties' request for rehearing, we find that Paragraph (B)(1) is unacceptable because it sets forth a mechanism for determining when a default contract should/must be filed based on a specific percentage of volumes which must be under contract before a default contract can be filed. We believe the pipeline and/or its proposed transferee may need more flexibility and the option of filing a default contract should not be so limited. Paragraph (B)(3) would have the default contract remain under the jurisdiction of the Commission indefinitely and apply to customers other than the pipeline's existing customers. As discussed in this order, the Commission does not have jurisdiction over gathering performed by parties other than interstate

pipelines; therefore, the Commission cannot retain jurisdiction over the default contract. The only jurisdiction the Commission has is over the interstate pipeline's proposal to abandon gathering facilities and to change its gathering service. Since the default contract is only meant to provide a transition to a fully unregulated gathering environment, the Commission does not believe it should use its jurisdiction over the abandonments and changes of service to mandate the terms and conditions of the transferee's gathering service, except for a limited period of time and for existing customers.

We also reject Paragraph (B)(4) because it proposes a rate term for the default contract based upon a system average rate. As discussed below, we think the pipeline's currently effective gathering rate for a customer should be the appropriate default rate for similar service. Paragraph (B)(6) seeks to include terms and conditions in the default contract which go beyond what may be necessary to provide transitional gathering service for existing customers. As discussed below, we agree with the provision in paragraph (B)(5) that provides that the terms and conditions of the default contract should provide for "comparable operational service, and quality specifications in existence prior to the spin-down." However, we reject the provision in that paragraph regarding protection against the gatherer's tying services to its pipeline affiliate's services, since the pipeline is already prohibited from such tying arrangements and the Commission's complaint mechanism may be used to remedy such abuses. Further, we reject the provision in paragraph (B)(5) proposing that the default contract be

binding on the gatherer's successors and assigns. The default contract will be binding on the gatherer's successor or assigns only to the extent that such a provision is included in the contract or was in a customer's contract with the pipeline, as explained below. Finally, paragraph (B)(2) imposes unnecessary notice provisions on the default contract process. As stated above, when a default contract is required to be filed with an abandonment application and/or the proposed change in service filing, customers of a pipeline will have an opportunity to intervene in the abandonment proceeding and comment on the proposed default contract in their protests.

Regarding the standards for the default contract itself, the May 27 order stated that the rates, terms and conditions of such a contract should not beinconsistent with the rates, terms and conditions for gathering service offered by independent gatherers in the region. As noted, several petitioners have concerns regarding this standard. Further, the IPAA, Indicated Shippers, and Oklahoma Association filed protests to Gathering Company's default contract proposal and Indicated Shippers made a number of comments in its responses to staff data requests. Generally, the parties propose changes to many of the provisions in Gathering Company's default contract. Since the burden is on Gathering Company to propose a default contract, we will not analyze or address each and every provision of the alternative proposals.

However, the parties do object to specific aspects of Gathering Company's default contract. For example, they are concerned that the default contract will not

provide rate certainty for a specific term and that, absent such provisions, shippers will be prevented from obtaining service for a term longer than month-to-month and service for a fixed-rate. Additionally, the parties object to either the absence of certain types of provisions in the default contract, for example a cap on the shipper's liability for fuel losses, or to certain provisions as proposed, such as the force majeure provisions of the default contract.

Upon further reflection and based upon the objections raised by petitioners and the protesters, as well as our analysis of the default contract in this proceeding (which is the first one filed in response to our May 27 orders), we conclude that more specific Commission guidance is necessary.

First, we conclude that the default contract must provide the shipper with a definite term of service. The available term of service is an important element in the shipper's ability to obtain price certainty absent regulation of gathering rates. However, since the Commission's goal in establishing the default contract mechanism is to protect the shipper from an immediate, and therefore arbitrary, termination of existing service by providing price certainty during the transition to a fully unregulated environment, the default contract need not provide for unlimited duration. To provide an incentive for both the gatherer and the shipper to reach a negotiated agreement rather than to rely on a default contract, we believe the gatherer should be allowed to limit the available term under the default contract to two years. A two-year limit will reasonably balance the shipper's need for transitional

price certainty with the gatherer's interest in limiting its obligation to provide service to those reached by mutual agreement with its customers. Further, a two-year period will allow shippers a reasonable time in which to consider their options for service upon expiration of the term of the default contract.[74] We note, however, that a shipper under the default contract should be permitted to subscribe for service for a term of less than two years if the shipper wants service for a shorter duration.

Second, we conclude that the default contract should include a specific rate or rate formula that would apply over the term of the agreement so that the shipper may have price certainty in lieu of regulatory protection for at least a term of two years. Although in the May 27 orders we stated that the default rate should not be inconsistent with the prevailing rates for similar service within the region served by the pipeline gatherer, upon consideration, we will require that the default rate be the rate that the pipeline is currently charging the customer

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[74]We also note that several producing states commented in the gathering conference in Docket No. RM94-4-000, that because of the local nature of gathering, the states were better situated and uniquely qualified to regulate gathering activities and to provide suitable remedies for abuse. See comments of Kansas Corporation Commission, Louisiana Department of Natural Resources, Oklahoma Corporation Commission, and Texas Railroad Commission filed in Docket No. RM94-4-000. In the May 27 order, the Commission indicated that states could exercise their jurisdiction over gathering affiliates except where the Commission finds that a pipeline and its gathering affiliate should be treated as a single "natural gas company." The two year period will allow states a reasonable time period to implement any policies they deem necessary in the absence of federal regulation of gathering.

for similar service. However, since the default contract period may run for two years, an appropriate escalator clause may be included in the contract. We think tying the default rate to the rate the pipeline currently charges a customer for gathering will balance all parties' concerns regarding this issue. On the one hand, shippers under the default contract will be able to obtain service at the same rate they currently pay. While shippers may not have been altogether satisfied with that rate, they will at least know that during the interim two-year period they will not be subjected to significant rate increases. On the other hand, the pipeline's successor-in-interest will be able to charge a rate which the pipeline viewed as reasonable for the service offered and which the Commission approved. Since the default contract may be limited to a two-year term, the gatherer will not be locked into this rate indefinitely, and may negotiate an increased rate for service after the expiration of the two-year period. Further, using the pipeline's current gathering rate as the default rate will eliminate the evidentiary problems cited by the petitioners due to the fact that other gatherers' contracts are often unavailable.

Third, the default contract should contain terms and conditions consistent with those included in the existing contracts between the pipeline gatherer and the customers who will be parties to the default contract. Where the pipeline gatherer and its customers do not have service agreements, the default contract should provide for terms and conditions that will result in service comparable to the gathering service currently provided by the pipeline. After reviewing the default contract

proposed by Gathering Company, and upon consideration of the objections to it, the Commission believes it is necessary to require consistency between the general terms and conditions of the pipeline's gathering service and the general terms and conditions of the default contract in order to assure that default contract provisions, other than rate and term, not be used to so burden the shipper that, as a practical matter, its service has been arbitrarily terminated. Without this consistency, the default contract's penalty, balancing, curtailment, or scheduling provisions could be so vague, arbitrary or onerous that a shipper will be unable to use the service for which it has subscribed under the default contract.

Thus, for example, the default contract proposed by Gathering Company, which by definition was not a product of negotiations, contains a number of open ended provisions that could have been applied in an onerous manner by the gatherer. One instance is the curtailment provision (Section 14.1) which allows the gatherer to interrupt service for force majeure on its system, curtailment on other pipeline, or "any other reason." Also, the contract provides no limit on the shipper's liability for fuel losses. On the other hand, we are mindful that the default contract should not be one sided in favor of the gathering customer. To balance both the gatherer's and shippers' interests regarding the default contract provisions, we have concluded that the pipeline's existing terms and conditions for service should be used for the transition to an unregulated gathering environment. The Commission anticipates that when a pipeline is required to file a default contract, it will include a statement

explaining the basis for any rate escalator. Existing customers who are parties to the proceeding, may protest the rate provisions of the contract by demonstrating that the proposed rate is inconsistent with the pipeline's prevailing rates and may protest the term of the default contract if the gatherer has not offered at least two years of service at a defined rate. Protests to terms and conditions, other than rates and contract duration, may be based on comparisons to the pipeline's existing gathering contracts or, in the absence of such contracts, to the pipeline's existing terms and conditions for gathering service. Rehearing regarding the specific rates, terms and conditions of the default contract is granted and clarified to the extent discussed herein.

Shippers should keep in mind that the Commission is endeavoring to protect the reasonable expectation that gathering service will not be terminated arbitrarily after a transfer of gathering facilities. We emphasize that the default contract process is designed to serve as a transition mechanism and is not intended to guarantee that gathering customers will be able to obtain service indefinitely under the same terms and conditions under which they currently take service from the pipeline. Thus, shippers who opt for service under a default contract will be assured service for a two-year period; after that period expires, the gatherer will not be obligated to continue providing service to that customer.

2. Gathering Company's Proposed Default Contract

As noted above, on October 4, 1994, Gathering

Company filed its proposed default contract, and stated that it has accounted for approximately 70 percent of the gathering volumes or 59 of the gathering shippers. However, based upon the Commission's review of the material submitted by Gathering Company and by the IPAA, we think Gathering Company's characterization of its negotiating posture appears to be overstated.[75] We note that Gathering Company's default contract was filed while its negotiations with customers are still ongoing and that Gathering Company asserts that some of NorAm's current gathering customers are declining to negotiate in order to force it to file a default contract. Gathering Company maintains that the terms and provisions of its proposed default contract are not unreasonable or arbitrary, nor inconsistent with those provisions being offered by independent gatherers in the relevant area. To support this contention, Gathering Company has submitted a sampling of contracts under which other gatherers in the region provide service and a sampling of the contracts it has already entered into with customers. As previously discussed, Gathering Company has requested confidential treatment for these contracts. However, in light of the guidelines set forth above, it will not be necessary to review the contracts of other gatherers' in the region. Thus, we will not discuss these contracts here.

In general, under Gathering Company's proposed

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[75]In response to a date request, Gathering Company indicates that it had further negotiations planned for November for what it had designated as "potential contracts."

default contract, shippers have two basic rate options. Under option one, Gathering Company would negotiate a fixed-rate contract and cap fuel charges in return for the shipper's commitment of its reserves for the term of the contract. Under option two, Gathering Company would charge no more that 14.17 cents, NorAm's current maximum gathering base rate, for shippers under month-to-month contracts through March 1995.[76] Under option two, a shipper could negotiate a fixed rate by committing reserves and Gathering Company would not charge a shipper an amount that exceeds the amount that would have been collected if all the volumes had been gathered at the 14.17 cent rate. This rate cap, however, only runs through September 1995.[77] Additionally, under the proposed default contract, the term could be negotiated with the dedication of reserves. After the primary term expires, the contract becomes a month-to-mouth contract with termination rights by either party with 10 days notice.

While Gathering Company appears to have made an effort to develop a default contract based upon the guidelines articulated in the May 27 order, in light of the minimum standards or guidelines discussed above, we

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[76]Gathering Company points out that if a shipper requests that it install new compression or other facilities for the purpose of providing low pressure or other additional gathering services the rate may be higher that 14.17 cents.

[77]After September 1995, the rate will be unilaterally set by Gathering Company through posting on its Electric Bulletin Board.

conclude that Gathering Company must modify the proposed default contract. The contract proposed by Gathering Company provides for a term to be negotiated by the parties, along with a fixed rate, and for a month-to-month term, terminable by either party upon notice, after the expiration of the primary term. If such a term and fixed-rate cannot be negotiated, the term of the contract will be month-to-month.

However, as discussed above, since the Commission's goal in establishing the default contract mechanism is to provide a reasonable transition period for former pipeline gathering customers who cannot reach private agreements with the pipeline's successor-in-interest, we think the shippers should be offered some fixed term longer than a month. On the other hand, because of the transitional purpose of the default contract, we have concluded that the gatherer should be allowed to limit the primary term of the default contract to two years. While the shipper may request a term of less than two years, or the gatherer may offer a primary term longer than two years, the gatherer must offer at least a two-year primary term. Gathering Company must modify its default contract to provide for a primary term of two years, unless the shipper requests a shorter term or the gatherer chooses to offer a longer term. Also, as discussed, the default contract should offer a rate equal to the pipeline's existing gathering rate for similar service. In the instant case, the only fixed-rate option is for a short-term, month-to-month period. A longer term fixed rate must be negotiated. Yet, if the parties were amenable to further negotiation, they would

be free to enter into a private agreement rather than to rely on the default contract. The default contract must address the needs of shippers who cannot or will not negotiate specific terms. The 14.17 cent rate proposed under Gathering Company's second option represents NorAm's currently effective maximum rate for gathering. Gathering Company should modify its default contract so that a shipper may receive service for up to two years at a 14.17 cent rate. A reasonable escalator clause may be included. With regard to the other terms and conditions of the default contract, we have stated that such terms and conditions, other than the rate and duration provision, should be consistent with the terms and conditions under which the pipeline currently provides gathering service. The Commission will require Gathering Company to modify the terms and conditions of the default contract to conform to the terms and conditions under which NorAm currently provides gathering service for the customers who will be subject to the default contract. Thus, the default contract shippers will be protected, for two years, from unilateral action by the gatherer to the same extent as they were when NorAm provided the service.

The Commission finds that if Gathering Company makes the modifications discussed, its default contract will meet the guidelines set forth by the Commission in this order and will promote the goals of the default contract mechanism. We will defer action on NorAm's application to abandon facilities and its section 4 filing to change/terminate service (once it is filed) until the modified default contract is filed.

H. Other Issues

Indicated Parties argues that the Commission's May 27 decision would eviscerate Order No. 636. Specifically, Indicated Parties argues that NorAm will evade the requirements for open access, non-discriminatory rates, and protection against affiliate abuse by forming an affiliated gatherer. We disagree.

As stated, the Commission intends for the default contract to serve as a transitional mechanism so that existing customers will not have their gathering service arbitrarily terminated in the event of a transfer of gathering services by an interstate pipeline. The Commission is confident that Gathering Company and NorAm's existing customers will be able to negotiate rates, terms and conditions that will allow existing customers to continue to receive gathering service under reasonable terms and conditions, i.e., rates, terms and conditions that would not tend to thwart the goal in Order No. 636 of insuring that all shippers have meaningful access to pipeline transportation grids. Further, in the May 27 order, the Commission required NorAm to include certain standards of conduct that it believed would guard against the risk of affiliate abuse.

Finally, the State PSCs argue that the Commission should require Gathering Company to demonstrate that its rates will be just and reasonable. It also contends that the Commission should cap Gathering Company's maximum gathering rate at the level approved in Docket

No. RP93-9-000, Phase II, for three years. Rehearing on this issue is denied. First, as stated, because Gathering Company is a non-jurisdictional entity it does not need to meet the just and reasonable rate standard. Second, the Commission wants Gathering Company to have the flexibility to offer gathering services under rates, terms and conditions tailored to the specific needs of the customers. Therefore, we believe that a maximum gathering rate would be inappropriate and would hinder Gathering Company's flexibility.

The Commission orders:

(A) The petitioners' requests for rehearing are denied in part, and granted in part, as discussed herein.

(B) NJR's motion to intervene out-of-time is granted.

(C) Gathering Company should modify its proposed default contract in accordance with the discussion in the body of this order.

APPENDIX E

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 USCS § 717 (1996)

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of 15 USCS § § 717 et seq. applicable. The provisions of this Act [15 USCS §§ 717 et seq.] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for

such distribution or to the production or gathering of natural gas.

(c) Intra-state transactions exempt from provisions of 15 USCS §§ 717 et seq.; certification from state commission as conclusive evidence. The provisions of this Act [15 USCS §§ 717 et seq.] shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act [15 USCS §§ 717 et seq.] by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power of jurisdiction.

(d) The provisions of this Act [15 USCS §§ 717 et seq.] shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is--

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

APPENDIX F

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 USCS § 717c (1996)

§ 717c. Rates and charges

(a) Just and reasonable rates and charges. All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to thejurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited. No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules. Under such rules and

regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission. Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates. Whenever any such new schedule is filed the Commission shall have authority,

either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund,

with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

APPENDIX G

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 USCS § 717d (1996)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates. Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract, affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly

discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation. The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX H

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 USCS § 717f (1996)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing. Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: Provided, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission. No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity.

(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be

served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity. Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity. Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefore, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act [15 USCS §§ 717 et seq.] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the isssuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and

conditions as the public convenience and necessity may require.

(f) Determination of service area.

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served. Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc. When any holder of a certificate of public

convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Supreme Court, U.S.
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CLERK

No. 96-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO ENERGY TRADING CORPORATION, AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, CONOCO INC., INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA and MARATHON OIL COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS NORAM FIELD SERVICES CORP., NORAM GAS TRANSMISSION CO., GPM GAS CORP. AND WILLIAMS FIELD SERVICES CO. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals and the Federal Energy Regulatory Commission correctly determined that § 1(b) of the Natural Gas Act, by expressly excluding the gathering of natural gas from the Commission's jurisdiction, precludes the Commission from regulating NorAm Field Services Corp.'s gathering activities and facilities.

PARTIES TO THE PROCEEDINGS

Respondents NorAm Field Services Corp. ("NFS") and NorAm Gas Transmission Company ("NGT") are organized and existing under the laws of the State of Delaware. NFS has its principal place of business located in Shreveport, Louisiana and NGT has its principal place of business located in Houston, Texas. The parent of both NFS and NGT is NorAm Energy Corp. ("NorAm"). NorAm has no subsidiaries that are not wholly owned. On August 21, 1996, NorAm entered into a definitive merger agreement with Houston Industries Incorporated, a publicly traded company.

Respondent GPM Gas Corporation ("GPM") is organized and existing under the laws of the State of Delaware and has its principal place of business in Houston, Texas. GPM is wholly owned by Phillips Gas Company ("PGC"), also a Delaware corporation headquartered in Houston, Texas. All common stock of PGC is owned by Phillips Petroleum Company ("Phillips"), a Delaware corporation headquartered in Bartlesville, Oklahoma. Phillips and PGC each have publicly traded securities.

Williams Field Services Company ("Williams") is wholly-owned by Williams Field Services Group, Inc., which is wholly-owned by Williams Holdings of Delaware, Inc., which is wholly-owned by The Williams Companies, Inc. ("TWC"). The following are subsidiaries of TWC which are not wholly-owned by TWC: Apco Argentina Inc.; Kern River Gas Transmission Company; NESP Supply Corporation; Tubexpress, Inc.; Reservco Inc.; Altra Energy Technologics L.L.C.; TransNetwork Holding Company; Nebraska Energy, L.L.C.; Wiljet, L.L.C.; Parkco, L.L.C.; Free Port Terminal Company Limited; American Soda,

L.L.P.; Kiowa Gas Storage, L.L.C.; Northern Border Partners, L.P.; and Northern Border Intermediate Limited Partnership.[1]

[1] Although their facilities are not involved in these proceedings, respondents Williams and GPM share an interest in the legal issues presented. Williams is, like NFS, a gathering affiliate of an interstate pipeline. GPM has acquired facilities from an unaffiliated interstate pipeline.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THE DECISION BELOW DOES NOT IMPLICATE, LET ALONE CONFLICT WITH, THIS COURT'S DECISIONS IN *MAISLIN* AND *MCI*.	3
II. THE DECISION BELOW IS COMPLETELY CONSISTENT WITH, AND INDEED IS COMPELLED BY, THIS COURT'S DECISIONS CONSTRUING THE NATURAL GAS ACT	4
III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases **Page**

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 7
Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945) 4, 5, 6
FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949) 4, 5, 6, 7
Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947) 4, 5
MCI Telecommunications Corp. v. American Telegraph & Telegraph Co., 114 S. Ct. 2223 (1994) . . 3, 4
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 3, 4
Northern Natural Gas Co. v. FERC, 929 F.2d 1261 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991) 8
Northwest Pipeline Corp. v. FERC, 905 F.2d 1403 (10th Cir. 1990) 1
Panhandle Eastern Pipe Line Co. v. Public Service Committee, 332 U.S. 507 (1947) 4
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 5
Transcontinental Gas Pipe Line Corporation v. FERC, 998 F.2d 1313 (5th Cir. 1993) 8

Statutes

Natural Gas Act, 15 U.S.C. §§ 717-717z 1
15 U.S.C. § 717(b) 1, 3, 4, 5
15 U.S.C. § 717(c) 5
15 U.S.C. § 717(d) 5

Agency Orders

Amoco Production Co., 64 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,027 (1993) 3
Farmland Indus., Inc., 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,063 (1983) 1

Northern Natural Gas Co., 74 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,289 (1996) 2
Panhandle Eastern Pipe Line Co., 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,343 (1995) 2
Southern Natural Gas Co., 72 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,109 (1995) 3
Order No. 636, 57 Fed. Reg. 13,267 (1992), *on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (per curiam) 2
Order No. 436, 50 Fed. Reg. 42,408 (1985), *on reh'g*, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), *on reh'g*, Order No. 436-B, 51 Fed. Reg. 6,398 (1986), *on reh'g*, Order No. 436-C, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,404, *on reh'g*, Order No. 436-D, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,405, *on reh'g*, Order No. 436-E, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,403, (1986), *vacated in part by Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 2

STATUTORY PROVISIONS INVOLVED

In addition to those provisions appearing in the petition at 2-3, the following statutory provision is involved in this case. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

At issue in this case is the Federal Energy Regulatory Commission ("the Commission") determination that the Natural Gas Act denies it jurisdiction over the "gathering" of natural gas by respondent NFS. "Gathering" is the process by which natural gas is collected from wells and brought by various lines to a point where it is transferred to a transmission pipeline. *See Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404, n. 1 (10th Cir. 1990).[2] The Natural Gas Act, upon which petitioners rely, expressly "[does] not apply to . . . gathering of natural gas." 15 U.S.C. § 717(b).

Historically, pipelines provided "bundled" transportation and sales services. Bundled transportation service included under a single rate the gathering, transportation and storage of natural gas. Bundled sales service included all of these services plus the cost

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[2] Gathering is distinguished from transmission by a number of factors, including the size and operating pressure of the lines, their configuration, and the location of wells and processing plants. (Pet. App. 47.) *See generally Farmland Indus., Inc.*, 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,063 (1983). The Commission found (Pet. App. 47-54) and petitioners do not now dispute (Pet. 10 n.8.) that the facilities and services in question are "gathering."

of the gas itself, in a combined rate. In 1992, the Commission issued Order No. 636,[3] requiring all interstate pipelines to "unbundle" their services. One effect on NGT and other pipelines was that gathering service must now be marketed and contracted for separately. In 1993, NGT, an entity engaged in interstate transportation and therefore subject to Commission jurisdiction, sought to transfer substantially all of its gathering assets, facilities, and services to a separate company, NFS, which would not be subject to Commission jurisdiction and could therefore compete on even terms with independent and producer-affiliated gathering companies.[4]

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[3] Order No. 636, 57 Fed. Reg. 13,267 (1992), *on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992) (collectively, "Order 636"), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (per curiam). *See also* Order No. 436, 50 Fed. Reg. 42,408 (1985) (offering incentives for, but not requiring, unbundling), *on reh'g*, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), *on reh'g*, Order No. 436-B, 51 Fed. Reg. 6,398 (1986), *on reh'g*, Order No. 436-C, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,404, *on reh'g*, Order No. 436-D, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,405, *on reh'g*, Order No. 436-E, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,403, (1986), *vacated in part by Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[4] The Commission noted that 70% of natural gas gathering is performed by companies not regulated by the Commission. (Pet. App. 148.) Among producers engaged in unregulated gathering are petitioners Amoco Production Co., Anadarko Petroleum Co., and Marathon Oil Co. *See* Joint Appendix at 496-98, *Conoco Inc. v. FERC*, No. 94-1724 (D.C. Cir. 1996). Moreover, some producers have sought to purchase gathering facilities from pipeline companies and relied on § 1(b) of the Natural Gas Act to avoid Commission regulation of their gathering activities, even while claiming here that § 1(b) does not apply to gathering by NFS. *See Northern Natural Gas Co.*, 74 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,289 (1996) (acquisition of gathering facilities by petitioner Conoco Inc.); *Panhandle Eastern Pipe Line Co.*, 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,343 (1995) (acquisition of

NFS sought a declaratory order that it, like other gathering companies, would be exempt from the Commission's jurisdiction pursuant to § 1(b) of the Natural Gas Act. The Commission found that it had no jurisdiction over NFS. (Pet. App. 54, 60-64, 135-40.)[5] The court of appeals upheld the Commission's jurisdictional determination. (Pet. App. 25.)

REASONS FOR DENYING THE WRIT

The petition should be denied because the decision below is squarely consistent with — and indeed is compelled by — this Court's precedents, it does not conflict with the decision of any other court of appeals, and petitioners' argument is without merit.

I. THE DECISION BELOW DOES NOT IMPLICATE, LET ALONE CONFLICT WITH, THIS COURT'S DECISIONS IN *MAISLIN* AND *MCI*.

Petitioners first distort this case as one in which the Commission abdicated jurisdiction over gathering without direction from Congress and suggest that this Court's decisions under the filed rate doctrine, such as *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. American Tel. & Telegraph Co.*, 114 S. Ct. 2223 (1994), have some bearing. In fact, Congress has expressly denied the Commission the power petitioners urge it to seize, and *Maislin* and *MCI* therefore do not apply.

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gathering facilities by Anadarko Gathering Co., a wholly owned subsidiary of petitioner Anadarko Petroleum Co.); *Southern Natural Gas Co.*, 72 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,109 (1995) (acquisition of gathering facilities by petitioner Amoco Production Co.); *Amoco Production Co.*, 64 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,027 (1993) (same).

[5] The Commission imposed certain conditions in its orders, some of which NorAm successfully challenged in the court of appeals (Pet. App. 25-33). Those conditions are not at issue here.

To invoke *Maislin* and *MCI*, petitioners simply ignore the jurisdictional provision of the Natural Gas Act, § 1(b), 15 U.S.C. § 717(b). In both *Maislin* and *MCI*, there was no dispute that the rates in question fell within the agency's statutory jurisdiction. *See Maislin*, 497 U.S. at 126-28; *MCI*, 114 S. Ct. at 2228. Those cases instead concerned what discretion the agencies had to relieve regulated entities from the statutorily imposed burden to charge only filed rates. Here, however, § 1(b) of the Natural Gas Act, which "determines the Act's coverage," *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm.*, 332 U.S. 507, 516 (1947) ("*Panhandle II*"), unambiguously provides that "[t]he provisions of this Act," including §§ 4 and 5, upon which petitioners rely, "*shall not apply to* . . . the production or *gathering of natural gas.*" 15 U.S.C. § 717(b) (emphases added). Section 1(b) governs this case. The court of appeals upheld "the Commission's determination that the gathering facilities at issue are exempt under NGA § 1(b)." (Pet. App. 25.)

The issue is therefore not whether the Commission had discretion to "deregulate" gathering, but whether the Commission correctly determined that Congress never brought gathering by NFS under federal regulation in the first place. In light of § 1(b)'s clear exclusion of gathering and this Court's recognition of "the care taken by Congress to keep the power over the production and gathering of gas within the states," *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 512 (1949) ("*Panhandle III*"), *Maislin* and *MCI* simply have no relevance here.

II. THE DECISION BELOW IS COMPLETELY CONSISTENT WITH, AND INDEED IS COMPELLED BY, THIS COURT'S DECISIONS CONSTRUING THE NATURAL GAS ACT

Petitioners' argument that the decision below conflicts with the decisions of this Court under the Natural Gas Act depends on selective and misleading citation of the relevant caselaw. It rests on the false premise that *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945), and *Interstate Natural Gas Co. v. FPC*, 331

U.S. 682 (1947), extended the Commission's jurisdiction to include the regulation of gathering. They did no such thing. *Colorado Interstate* itself recognized that § 1(b) precluded the Commission from "any control" of gathering, 324 U.S. at 602-03, and this Court has since recognized, in a decision relied upon by the court of appeals but not cited by petitioners, that *Colorado Interstate* and its progeny "are not precedent for" regulation of activities excluded by § 1(b). *Panhandle III*, 337 U.S. at 506, *quoted in* Pet. App. 17.

In 1938, Congress enacted the Natural Gas Act to "plug the 'gap'" in the regulation of the natural gas industry created by decisions of this Court denying states the authority to regulate interstate natural gas transportation and wholesale sales based on the negative implications of the Commerce Clause. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682-83 (1954); *Interstate Natural Gas Co. v. FPC*, 331 U.S. at 690. In § 1(b) of the Act, however, Congress carefully excluded from federal jurisdiction those areas in which the states were "constitutionally competent to act," *id.*, and thus expressly provided that the Act "shall not apply to . . . the production and gathering of natural gas." 15 U.S.C. § 717(b).

As interstate pipelines then operated, many provided gathering services in conjunction with interstate transportation or wholesale sales regulated by the Commission, and charged a "bundled" rate. In *Colorado Interstate*, 324 U.S. at 602-03 (emphasis added), this Court held that while "[c]ertainly [§ 1(b)] precludes the Commission from *any control* over the activity of producing or gathering natural gas," the Commission could take into account gathering costs "for the purposes of determining the reasonableness of rates *subject to its jurisdiction*," that is, bundled interstate wholesale rates. *Accord, Interstate*, 331 U.S. at 691; *Phillips*, 347 U.S. at 680-81.

Petitioners argue that this ratemaking authority under §§ 4 and 5, 15 U.S.C. §§ 717c, 717d, requires the Commission to regulate NFS and its gathering activities, though NFS provides no jurisdictional services. The authority recognized by *Colorado*

Interstate, however, does not go that far. Justice Jackson, who provided the deciding vote in *Colorado Interstate*, explained:

> The statute commands the Commission to regulate the price of natural gas transported and sold at wholesale in interstate commerce for resale. . . . [A] commission is free to take evidence as to conditions and events quite beyond its regulatory jurisdiction where they are thought to affect the cost of that whose price it is directed to determine. This, as I see it, is all that has been done here.

324 U.S. at 609 (Jackson, J., concurring). And that was all the Commission could do:

> [T]he Act excludes 'production or gathering of natural gas' from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction.

Id. Moreover, this Court has rejected precisely the reasoning advanced by petitioners. As the court below recognized, the ability to take production and gathering costs into account in setting jurisdictional sales rates "is not a precedent for" regulation of nonjurisdictional activities themselves. *Panhandle III*, 337 U.S. at 506 (discussing *Colorado Interstate*), *quoted in* Pet. App. 17.

In *Panhandle III*, this Court held, on facts closely analogous to this case, that the Commission could not regulate a natural gas company's transfer of facilities that fell within § 1(b)'s "production and gathering" exception.[6] With respect to the

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[6] Panhandle Eastern, an interstate pipeline company, sought to transfer to a separate company gas leases comprising 12% of its total gas reserves. The pipeline had previously included the reserves in its rate base for jurisdictional services and among the reserves that supported approval of its expansion of pipeline facilities. The Commission asserted authority to review the transaction. Although acknowledging that the leases were an element of production within § 1(b)'s production and gathering exclusion, the Commission sought to avoid § 1(b) by

provisions that petitioners here assert require the Commission to regulate NFS's gathering, the Court observed:

> Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms.

Panhandle III, 337 U.S. at 508. "The repetition of the words 'subject to the jurisdiction'" in those sections made "clear" to the Court that Congress did not intend those sections to reach matters excepted by § 1(b). *Id.* The Court concluded that to construe those sections

> [to] establish wide control by the [Commission] over the production and gathering of gas. . . . would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress.

Id. at 509.

Accordingly, the court of appeals correctly upheld the Commission's determination that it has no jurisdiction over NFS's gathering. Petitioners' argument that the court of appeals misapplied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by deferring to the Commission rather than applying "settled law" (Pet. 17-19) is frivolous. The court of appeals faithfully adhered to this Court's precedents, summarized above. The court of appeals did not, as petitioners falsely claim, find that *Colorado Interstate* and its progeny "were not controlling due to claimed changed industry circumstances." (Pet. 17.) Rather, the court recognized that the holding in *Colorado Interstate* "expressly depended on the company's jurisdictional sales," and that this Court has never found "Commission jurisdiction over entities," such as NFS,

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relying on its ratemaking authority under §§ 4 and 5. *See Panhandle III*, 337 U.S. at 499, 507.

"performing neither jurisdictional sales nor jurisdictional transportation." (Pet. App. 16.) The court further recognized that this Court has allowed consideration of gathering only in setting jurisdictional rates, but has never permitted the direct regulation of unbundled gathering rates, as sought by petitioners. (Pet. App. 17.)

III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

In an attempt to concoct a split among the circuits, petitioners point only to dicta in a footnote in *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991). The footnote generically defined the court's reference to facilities "owned by the pipeline" to include facilities operated by a "parent, affiliate, subsidiary, or lessor[]." *Id.* at 1263, n. 2. *Northern Natural*, however, concerned only the Commission's ability to regulate gathering provided by a pipeline company itself.

Further, even if the quoted language of *Northern Natural* were not dicta, its reasoning would not apply here. Given the court's stated concern that failing to regulate a pipeline's gathering services could "in effect, permit the *pipeline* to establish rates for the interstate transportation," 929 F.2d at 1270, the blanket reference to related entities is more plausibly understood to refer to the Commission's undenied power to pierce the corporate veil between a natural gas company and affiliated entities and consider them as a single "natural gas company" if they unlawfully act in concert. *See Transcontinental Gas Pipe Line Corporation* v. *FERC*, 998 F.2d 1313 (5th Cir. 1993). Petitioners do not argue that the Commission should have done so here. Indeed, as the court of appeals acknowledged, the Commission orders under review conditioned the finding of no jurisdiction on "the affiliate maintain[ing] an independent, arms-length relationship with the

interstate pipeline," (Pet. App. 19).[7] Accordingly, it is much more convincing to read *Northern Natural* as being in harmony with the decision below, as the court of appeals regarded it (Pet. App. 19), than to strain to find a conflict in footnoted dicta.

Petitioners cite no other decisions of the courts of appeals that even arguably conflict with the decision below, and closely related issues are currently pending in other courts. (Pet. 13 & n. 12.) Accordingly, no purpose would be served by granting certiorari at this time.

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[7] The Commission imposed standards of conduct on NGT, the jurisdictional entity, to guard against the risk of affiliate abuse. (Pet. App. 63.) NorAm did not oppose those conditions.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 96-686

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO ENERGY TRADING CORP., ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly determined that it lacks jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, over the natural gas gathering rates charged by a natural gas company's affiliate, when the affiliate performs its gathering services independent of, and at arms length from, the natural gas company's interstate transportation services.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Altamont Gas Transmission Co. v. *FERC*, 92 F.2d 1239 (D.C. Cir. 1996)	12
Amerada Hess Corp., 52 F.E.R.C. ¶ 61,268 (1990)	2
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984)	7
Colorado Interstate Gas Co., Inc. v. *FPC*, 324 U.S. 581 (1945)	3, 7, 10
Interstate Natural Gas Co. v. *FPC*, 331 U.S. 682 (1947)	7
KansOk Partnership, 73 F.E.R.C. ¶ 61,160, order granting stay, in part, 73 F.E.R.C. ¶ 61,293 (1995), clarified, 75 F.E.R.C. ¶ 61,265 (1996)	8, 11
Louisiana Gas System, Inc., 73 F.E.R.C. ¶ 61,161 (1995)	9, 11
Northern Natural Gas Co. v. *FERC*, 929 F.2d 1261 (8th Cir.), cert. denied, 502 U.S. 856 (1991)	2, 4, 7, 10, 11
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954)	3, 7
United Distrib. Co. v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996)	3

Statutes and regulations:

Natural Gas Act, 15 U.S.C. 717 *et seq.*:	
§ 1(b), 15 U.S.C. 717(b)	2, 5, 6, 7, 10
§ 2(6), 15 U.S.C. 717a(6)	3, 10

Statutes and regulations—Continued: Page

§ 4, 15 U.S.C. 717c 6, 8, 9
§ 4(a), 15 U.S.C. 717c(a) 3, 9, 10
§ 4(c), 15 U.S.C. 717c(c) 3
§ 4(e), 15 U.S.C. 717c(e) 3
§ 5, 15 U.S.C. 717d 6, 8, 9
§ 5(a), 15 U.S.C. 717d(a) 3
18 C.F.R.:
Section 284.8(a)(1) 4
Section 284.9(a)(1) 4

Miscellaneous:

FERC Order No. 636, 57 Fed. Reg. 13,267, on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), aff'd in part and remanded in part *sub nom. United States* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) as amended (Pet. App. 34-35) is reported at 90 F.3d 536. The opinions of the Federal Energy Regulatory Commission (Pet. App. 36-103, 104-170) are reported at 67 F.E.R.C. ¶ 61,257 and 69 F.E.R.C. ¶ 61,280.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. The petition for a writ of certiorari

was filed on October 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Section 1(b) of the Natural Gas Act of 1938 (NGA), 15 U.S.C. 717(b), states that the provisions of the Act "shall apply to the transportation of natural gas in interstate commerce, * * * the sale in interstate commerce of natural gas for resale, * * * and * * * natural-gas companies engaged in such transportation or sale," but not to the "production or gathering of natural gas." "Gathering" is "the process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system." *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1265 (8th Cir.), cert. denied, 502 U.S. 856 (1991). There is no bright-line test for determining whether an activity constitutes interstate transportation, which falls within the jurisdiction of the NGA, or gathering, which does not. The Federal Energy Regulatory Commission (Commission) makes that determination on a case-by-case basis, applying a "primary function" test. See *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268 (1990).[1]

Sections 4 and 5 of the NGA, 15 U.S.C. 717c and 717d, require the Commission to establish for natural

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[1] The "primary function" test involves consideration of various factors: (1) the length and diameter of the pipelines; (2) the extension of the facility beyond the central point in the field; (3) the pipelines' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the pipelines. Pet. App. 11-13 & n.16. See, *e.g.*, *id.* at 46-54.

gas companies "just and reasonable rates" for or in connection with "the transportation or sale of natural gas subject to the jurisdiction of the Commission." 15 U.S.C. 717c(a) and 717d(a).[2] Section 4(c) requires natural gas companies to file their rates with the Commission, 15 U.S.C. 717c(c), and Sections 4(e) and 5(a) authorize the Commission to determine the lawfulness of any such rates or changes in rates, 15 U.S.C. 717c(e) and 717d(a).

b. Traditionally, interstate pipelines operated primarily as gas merchants, buying gas at the wellhead and selling it either to local distribution companies for resale or directly to end-users. Under that regime, pipelines charged a single "bundled" rate for both the gas sold and its transportation to the purchaser. In regulating the rate that an interstate pipeline could charge for the sale of gas, the Commission had jurisdiction to consider the costs of production or gathering that were embedded in the pipeline's sales rates. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677 (1954); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 601-604 (1945).

Recently, after implementing a series of orders to foster a more competitive marketplace for natural gas, the Commission issued Order No. 636,[3] which required pipelines to unbundle their sales and

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[2] Section 2(6) of the NGA, 15 U.S.C. 717a(6), defines a "natural gas company" as a person or corporation "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[3] 57 Fed. Reg. 13,267, on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), aff'd in part and remanded in part *sub nom. United Distrib. Co.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

transportation rates. Under Order No. 636, a pipeline generally may act only as a transporter once gas has left the production area and entered the pipeline's mainline systems. See 18 C.F.R. 284.8(a)(1) and 284.9(a)(1). Pursuant to its rate authority under Sections 4 and 5 of the Act, however, the Commission continues to require pipelines that provide gathering services to file their gathering rates. See *Northern Natural*, 929 F.2d at 1265 (Commission has jurisdiction over gathering rates where pipeline itself performs the gathering "in connection with" interstate transportation).[4]

2. Arkla Energy Resources Corporation (now NorAm Transmission Corporation) (NorAm Transmission), an interstate natural gas company, proposed to convey its natural gas gathering facilities to Arkla Gathering Services Company (now NorAm Field Services Corporation) (NorAm Field), its corporate affiliate, which would then assume responsibility for providing the gas gathering services that NorAm Transmission previously had offered. On October 21, 1993, NorAm Field sought from the Commission a declaratory order that certain gathering facilities and services it proposed to acquire from NorAm Transmission would, upon acquisition, be exempt from FERC's NGA jurisdiction. Petitioners, which are producers of natural gas (see Pet. 9 n.7), opposed that request, contending that the Commission was

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[4] The Eighth Circuit observed in *Northern Natural* that "[p]ermitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for the interstate transportation." 929 F.2d at 1270.

without authority to disclaim jurisdiction over NorAm Field's gathering rates and services.

The Commission determined that the subject facilities were "gathering facilities" within the meaning of NGA § 1(b), and that NorAm Field, as a provider of services using those gathering facilities (and no other services involving interstate transportation or sales), would not be a "natural gas company" subject to regulation under the NGA so long as it operates its gathering services independently of, and at arms length from, NorAm Transmission's transportation services. Pet. App. 36-103.[5]

The Commission specifically distinguished its disclaimer of jurisdiction over NorAm Field's gathering rates from its assertion of jurisdiction over the

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[5] To insure that the relationship remains arms-length, the Commission directed NorAm Transmission to amend its tariff to add the following standards of conduct:

> (a) [NorAm Transmission] will provide nondiscriminatory access to all sources of supply in accordance with Part 284 of the Commission's regulations and will not give shippers of its gathering affiliate undue preference over shippers of nonaffiliated gatherers or other customers in scheduling, transportation, storage or curtailment priority.
>
> (b) [NorAm Transmission] will not condition or tie its agreement to provide transportation service to an agreement by the producer, customer, end-user, or shipper relating to any service by any gathering affiliate, any services by it on behalf of its gathering affiliate, or any services in which its gathering affiliate is involved.

Pet. App. 63. The Commission also directed NorAm Field to offer gathering-service customers a *pro forma*, or default, contract for gathering services at reasonable rates and terms for a reasonable period of time after transfer of the facilities out of NGA jurisdiction. *Id.* at 64-66.

gathering rates charged by the natural gas company in *Northern Natural*. It pointed out that, while *Northern Natural* involved gathering performed directly by a natural gas company "in connection with" the pipeline's jurisdictional transportation services within the meaning of NGA §§ 4 and 5, this case involved gathering to be performed by an affiliate. The Commission explained that companies (such as NorAm Field) "that perform only a gathering function, whether they are independent or affiliated with an interstate pipeline, are not natural gas companies because they neither transport natural gas in interstate commerce, nor sell such gas in interstate commerce for resale." Pet. App. 61. The Commission took care to emphasize, however, that, while it "generally does not have jurisdiction over affiliated gatherers because affiliates are not natural gas companies," it may disregard corporate form and treat a pipeline and its affiliate as a single entity if the "affiliated gatherer acts in concert with its pipeline affiliate * * * in a manner that frustrates the Commission's effective regulation of the interstate pipeline." *Id.* at 61-62.

On rehearing, the Commission pointed out that natural gas companies often form separate affiliates "for the express purpose of separating the jurisdictional and nonjurisdictional activities," and that, ordinarily, such affiliation does not "subject the nonjurisdictional activities performed by one to the Commission's jurisdiction." Pet. App. 136. At the same time, the Commission again emphasized that it will disregard the corporate form and exert control

over the gathering activities of an affiliated gatherer when "statutory purposes would be frustrated by the corporate form." *Id.* at 138-139 (quoting Opinion No. 255, 37 F.E.R.C. ¶ 61,149, at p. 61,356 (1986)).

3. The court of appeals affirmed FERC's disclaimer of rate jurisdiction over NorAm Field's gathering services.[6] It upheld the Commission's interpretation of Section 1(b) of the NGA, under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), having concluded that "the statute itself does not clearly resolve the question one way or the other," and that "the Commission's interpretation is a permissible resolution of the ambiguity." Pet. App. 15.

The court of appeals rejected (Pet. App. 15-20) petitioners' contention that the Commission's decision conflicts with this Court's decisions narrowly construing the gathering exemption in Section 1(b), *e.g.*, *Phillips Petroleum Co.* v. *Wisconsin*, *supra*; *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947); *Colorado Interstate Gas Co.* v. *FPC*, *supra*. Those decisions, the court observed, "addressed the Commission's jurisdiction over gathering rates charged only by interstate pipelines, and thus do not control the question whether the Commission may regulate rates charged by independent or pipeline-affiliated entities." Pet. App. 15.

The court of appeals also found no conflict between the Commission's ruling here and the Eighth Circuit's decision in *Northern Natural*. Because *Northern Natural* involved the Commission's jurisdiction

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[6] The court reversed the Commission's imposition of the default contract condition on NorAm Transmission (see note 5, *supra*), and remanded that aspect of the Commission's order for further consideration. Pet. App. 33.

to regulate the gathering rates of an interstate pipeline that was itself performing gathering, the court explained that that case "provides no direct support for * * * [petitioners'] claim that the Commission can regulate the gathering activities of [an] independent affiliate." Pet. App. 19. The court noted, moreover, that "the rationale underlying the Eighth Circuit's decision—namely, the perceived danger that unregulated pipeline gathering rates might pose to effective regulation of transportation rates"—was addressed in this case by the Commission's requirement that the "affiliate maintain[] an independent, arms-length relationship with the interstate pipeline." *Ibid.*

Finally, the court noted that the Commission's position—that "an independently operated affiliate, solely providing gathering services, would be exempt from the Commission's NGA §§ 4 & 5 authority to review rates," but that the Commission may "exercise such authority if the affiliate should engage [with the pipeline] in anticompetitive behavior" (Pet. App. 20-21)—"parallels [the Commission's] treatment of gathering in general":

> [W]hile the Commission does not believe it has the general authority to regulate gathering rates, it has never renounced its authority * * * to include gathering costs in the rate base for bundled sales or interstate transportation service. Thus, the Commission consistently maintains that when gathering is intertwined with jurisdictional activities, the Commission's regulation of the latter may necessarily impinge on the former.

Id. at 24. The court distinguished cases, such as *KansOk Partnership*, 73 F.E.R.C. ¶ 61,160, order granting stay in part, 73 F.E.R.C. ¶ 61,293 (1995), clarified, 75 F.E.R.C. ¶ 61,264 (1996); and *Louisiana Gas System, Inc.*, 73 F.E.R.C. ¶ 61,161 (1995), in which FERC had "exercised jurisdiction over chains of interconnected intrastate affiliates that collectively functioned as interstate pipelines," on the ground that NorAm Field will not operate in tandem with NorAm Transmission, but will instead engage solely in nonjurisdictional gathering. Pet. App. 21 n.25.

ARGUMENT

The court of appeals correctly affirmed the Commission's conclusion that its rate jurisdiction under Sections 4 and 5 of the NGA does not extend to gathering services operated by a non-natural gas company affiliate of an interstate pipeline independent of, and at arms length from, the pipeline's interstate sales and transportation services. The court's decision does not conflict with any decision of this Court or of any other federal court of appeals. No further review is warranted.

1. Petitioners argue (Pet. 13-17) that Section 4(a) of the NGA requires the Commission to regulate rates for gathering services performed by an interstate pipeline's affiliate, and that the Commission's decision here amounts to *de facto* deregulation of interstate pipeline gathering rates. That argument is without merit.

Section 4(a) applies by its terms only to "rates and charges * * * received by [a] natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the

Commission." 15 U.S.C. 717c(a).[7] Under Section 2(6), 15 U.S.C. 717a(6), "'[n]atural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." NorAm Field performs no interstate transportation or sales—only gathering services, which are specifically exempted from the Commission's jurisdiction by Section 1(b), 15 U.S.C. 717(b).[8] Accordingly, under the plain language of the Act, NorAm Field is not subject to the Commission's rate regulation.

Contrary to petitioners' suggestion (Pet. 17), neither *Colorado Interstate* nor *Northern Natural* involved the Commission's jurisdiction *vel non* to regulate a non-natural gas company, like NorAm

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[7] Section 4(a) provides:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

[8] Section 1(b) provides:

> *The provisions of this chapter* shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or *to the facilities used for such distribution or to the production or gathering of natural gas.*

Emphasis added.

Field, that independently performs only gathering services. Both cases involved the quite different issue of the Commission's authority to regulate the reasonableness of rates charged by natural gas companies that directly engaged in gathering or production "in connection with" their interstate transportation or sale in interstate commerce for resale.[9]

2. The court of appeals correctly found no conflict (Pet. App. 21 n.25) between the Commission's decision in this case and its assertion of jurisdiction in *KansOk* and *Louisiana Gas* over "chains of interconnected intrastate affiliates that collectively functioned as interstate pipelines." The Commission lacks jurisdiction here precisely because the affiliated gatherer and the pipeline do not propose to operate collectively. As petitioners conceded below (Pet. App. 22 n.25), "'[i]t is one thing to argue that a non-jurisdictional affiliate can be created to perform non-jurisdictional activities,' as NorAm Field seeks to do, and 'it is another thing to allow a jurisdictional activity * * * to become a non-jurisdictional activity through the creation of an affiliate,' as the Commis-

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[9] Although the *Northern Natural* court stated in dictum that the expression "gathering facilities owned by the pipeline" includes "such facilities owned or operated directly or indirectly by a pipeline or its * * * affiliate," 929 F.2d at 1263 n.2, the case involved the Commission's jurisdiction to regulate gathering services performed directly by a natural gas company, and the Eighth Circuit held only that the Commission may regulate the rates a natural gas company itself charges for gathering services performed "in connection with" jurisdictional interstate transportation.

sion refused to allow in *KansOk* and *Louisiana Gas.*"[10]

In disclaiming jurisdiction over NorAm Field, the Commission has not, as petitioners charge, engaged in "empty formalism" (Pet. 19) or given "blind deference to corporate formalities in the exercise of its statutory responsibilities" (Pet. 20). Rather, the Commission has correctly recognized that its jurisdiction is limited to natural gas companies, and that companies, like NorAm Field, "that perform only a gathering function, whether they are independent or affiliated with an interstate pipeline, are not natural gas companies." Pet. App. 60-61. At the same time, however, the Commission specifically conditioned its disclaimer of jurisdiction on NorAm Transmission's compliance with substantive standards that imposed upon it an affirmative obligation to operate its jurisdictional services independently and at arms length from NorAm Field. If the pipeline and its affiliate violate those standards and collude so as to effect a jurisdictional service that falls within the Commission's jurisdiction, the Commission is prepared to disregard their separate corporate structures and treat the pipeline and the gatherer as a single entity. Far from giving "blind deference" to corporate formalities, the Commission carefully structured its order to ensure that the affiliated

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[10] For the same reason, there is no conflict (Pet. 20) between the decision in this case and that of the D.C. Circuit in *Altamont Gas Transmission Co.* v. *FERC*, 92 F.2d 1239, 1245 (1996). In that case, the court of appeals merely acknowledged (92 F.3d at 1245), as the Commission did below (Pet. App. 61-62, 138-139), that the Commission may disregard corporate form and "treat as a single entity" a nonjurisdictional gatherer and its affiliated pipeline when the two act in concert.

status of the pipeline and the gatherer cannot be abused to defeat the Commission's jurisdiction over interstate transportation and sales.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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